Supreme Court of the United States.

DECEMBER TERM, 1872.

No. 117.

WILLIAM H. GAINES and Others, Plaintiffs in Error,

vs.

JOHN C. HALE and HENRY M. RECTOR.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

Brief on the part of the Appellants.

~~STATEMENT OF THE CASE.~~

JAMES HUGHES, OF COUNSEL FOR PLAINTIFFS.

WASHINGTON, D. C.
W. H. MOORE, PRINTER, 511 ELEVENTH STREET.
1873.

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STATEMENT OF THE CASE.

The appellants are the heirs of Ludovicus Belding, and entered the quarter section of land, in Arkansas, on which the Hot Springs are situated, in December, 1851, by permission of the Secretary of the Interior, on appeal from the Commissioner of the Land Office, by virtue of a right of pre-emption, founded on occupancy and cultivation by their ancestor.

THIS IS THE BELDING CLAIM.

John C. Hale, one of the defendants in error, claims title to the same quarter section of land as assignee of one Percifull, under an alleged right of pre-emption. In connection with this claim, he attacks the pre-emption right of the plaintiffs in error, known as the "Belding claim," by alleging that Ludovicus Belding only occupied the land at

the time requisite to bring his occupation and cultivation within the terms of the act of Congress, as a tenant of Percifull.

The claim of Hale might be designated as the "Percifull claim," if he stood in as good a position as an heir of Percifull, but in fact it appears that he claims under a transfer or conveyance of some kind from Percifull, (who had in fact nothing to convey,) but which was junior to a preceding conveyance to one Paxton. However, for the purposes of this litigation, the claim of Hale may be designated as

THE PERCIFULL CLAIM.

The defendant, Rector, claims under an act of Congress of February 7, 1815, (4th Stats. at Large, 211,) by which it was provided, that any person owning land in New Madrid county, Missouri territory, materially injured by earthquakes, should be authorized to locate the like quantity of land on any of the public lands of that territory, the sale of which was authorized by law. There were some other provisions of detail, not necessary to refer to in a statement of the case. Four or five supplemental acts of Congress were passed on the subject of these New Madrid claims, as they are called. One Francis Langlois became the holder of a New Madrid certificate, to be entered on land in pursuance of the act of Congress, the quantity being two hundred arpens. The provisions of the various acts of Congress do not cover this claim, so far as it is applicable to the Hot Springs quarter section of land. But the defendant in error, Rector, who claims under these acts, affirms that all the provisions of the law providing for what are known as New Madrid certificates, and supplemental legislation, have been complied with, and that under the certificate of Langlois and subsequent transactions he has title to the Hot Springs. This claim may be designated as the New Madrid or LANGLOIS CLAIM.

Each of the parties litigant are in possession of a part of the quarter section of land in dispute—neither of the whole—each one holding what is called his "improvement," &c., and contending with the others for more; their respective titles and possessory rights being the subject matter of this litigation.

This is a suit between private parties, claiming under different acts of Congress, and *the United States is not a party to the record.*

By an act of Congress passed April 20, 1832, after the rights of plaintiffs in error had vested, (as they contend,) the Hot Springs, and four sections of land including them, were reserved from sale, entry, and location.—(4th Stats., 505.)

On the 11th of June, 1870, an act of Congress was passed conferring jurisdiction on the Court of Claims to hear and determine *suits against the United States* for this property, the proceedings to be according to the practice in equity, and the right of appeal to the Supreme Court of the United States reserved. Under this act, it may not be improper to state that claims have been filed for various parts of the ~~five~~ four sections reserved by the act of 1832, and are now pending in the Court of Claims to the number of 30 or more.

But the principal claimants are the parties to this record, each for himself, and as the proceedings must operate as an interpleader among the several claimants, and all the parties in interest are before the court, it is clear that original jurisdiction in equity has, by the grace and favor of the Government, founded in justice, been conferred on a court to hear and determine this controversy in all its bearings.

Long prior to the legislation last mentioned, the plaintiffs in error, representing THE BELDING CLAIM, and holding the certificate of entry before mentioned, sued the defendant, Hale, in the State Court of Arkansas, in an action of ejectment, to recover possession of that portion of the

quarter section of land in dispute occupied by him. Similar suits were also brought against

being the parties in possession of the residue of the quarter section. Judgment was rendered in favor of the plaintiffs, and on appeal to the Supreme Court of the State of Arkansas was affirmed. Thereupon the defendants brought the case to this court by writ of error, and the judgment of the Supreme Court of the State of Arkansas was affirmed. In that decision, the United States not being a party, it was held (saving the rights of the United States) that as to the claims of the parties to this record, *inter sese*—

1st. That the Belding claim and pre-emption was good, and well sustained the action of ejectment.

2nd. That the Percifull claim of Hale was not good.

3d. That the Langlois or New Madrid claim was not good. The Langlois or New Madrid claim in this record, though principally represented by Rector, it appears that in the former Hale claimed not only as a purchaser of Percifull's pre-emption, but also as a purchaser of an interest in the Langlois claim.—(See Hale's bill in this case, Record, p. 19; also, findings of fact by inferior State Court, Rec., p. 229.)

The Belding claim was sustained, and the decision of the Supreme Court of the State of Arkansas affirmed. This was done at the December Term, 1859, of this Court, and the case is reported in the 22d volume of Howard's Reports, beginning at page 144.

The plaintiffs in error were about to enforce their possessory rights as allowed by the decision of this Court, by writs of possession, &c., when the defendants in error concluded to try the whole controversy over again, in the State Courts of Arkansas by bills in chancery. It was but a change of the form of action, and no material facts that are new were developed in favor of the defendants in error. These suits were commenced in 1860, and terminated

in the State Courts in 1869, in favor of the defendants in error. It is a significant commentary upon this protracted litigation to get rid of a decision of the Supreme Court of the United States, that among the plaintiffs in error is found the name of John Wassell, *assignee in bankruptcy* of William H. Gaines.

That these suits in chancery are plainly and simply proceedings in a State Court, to reverse the decision of this Court, is apparent from the whole record, and particularly from the bill of complaint filed by Hale.—(Record, p. 24, last paragraph.)

On pages 223, 229, and 230 of the record is found the decision of the State Circuit Court, which to be appreciated must be read.

On appeal to the Supreme Court of the State, the decree of the inferior Court was modified and a new decree entered. (See Record, pp. 670, 671.) To reverse this latter decree, Gaines, and the other heirs of Belding, prosecute this writ of error, but neither Hale nor Rector took such a proceeding. They seem to be content.

The last named decree of the Supreme Court of Arkansas nullifies the former decision of the same Court, in favor of the Belding claim, as against Hale and Rector, and enjoins the plaintiffs in error from perfecting their possessory rights as expounded by this Court. It denies to the plaintiffs the benefit of their pre-emption claim, and their certificate of entry, and restricts their possession to the limits of the "improvement" of their ancestor, leaving the larger and better part of the quarter section of land in dispute to the defendants in error.

It is alleged that some succeeding Secretary of the Interior, who came into office years after the Belding entry was made, cancelled that entry. It does appear *that such an order* of cancellation was made; whether it was ever actually executed is a disputed question of fact, and its legal effect, if executed, under all the circumstances, is a question of law.

ASSIGNMENT OF ERRORS.

First Error. In granting an injunction against William H. Gaines and others, the plaintiffs in error, prohibiting them from enforcing their judgment or judgments at law in the action or actions of ejectment described in the pleadings in the cause.

Second Error. In not dismissing the bill of Hale, but granting relief under the same.

Third Error. In not dismissing the bill of Rector, but granting relief under the same.

Fourth Error. In declaring and decreeing the title of plaintiffs in error, and limiting the same to the improvements made by them, and nothing more.

Fifth Error. In decreeing title to Hale, as set forth in said decree.

Sixth Error. In decreeing title to Rector, as set forth in said decree.

Seventh Error. In rendering a decree adverse to the title of the plaintiffs to all and every part, or to any part of the quarter section of land in controversy, as against the defendants in error and each one of them.

As a preliminary to stating the points on which the appellants rely, it may not be improper to call attention to the fact that the "Belding Claim" is affirmatively asserted in the answers of the appellants to the bills of the defendants, and though no cross bill was filed praying relief, yet as the proofs were full upon that subject, the whole title of the plaintiffs was drawn in question *and the decision was adverse.* (See the answer of plaintiffs to Hale's bill, beginning on page 144 of the record, and their answer to Rector's bill, beginning on page 322 of the record.)

In the case in 22d Howard, the decision of the Court below having been favorable to the present plaintiffs, this Court must have taken jurisdiction on the ground that it was adverse to the "Percifull Claim" and the Langlois Claim.

These exploded titles can only be considered here *as reasons* assigned for impeaching the title of the plaintiffs; in that light it is presumed that they may be legitimate subjects of discussion.

Some stress is laid by the counsel for defendants on the fact that in the brief of Mr. ROSE it is insisted that the defendants must recover, if at all, on the strength of their own title. This is done to avoid the jurisdiction. Mr. ROSE puts that proposition as a ground to show want of equity in the bills of the defendants, and in that he is certainly correct.

He waives nothing affecting the appellate jurisdiction of this Court; and the pleadings present too plain a case to admit of question.

POINTS FOR THE PLAINTIFFS IN ERROR.

First. The pre-emption claim and the entry of the Beldings, founded thereon, are valid.

Lytle *vs.* Arkansas, 9 How., p. 333.
Hutchings *vs.* Low *et al.*, decided at present term of this court.
Hale *vs.* Gaines, 22d Howard, p. 144.
Jackson *vs.* Wilcox, 1st Scam., p. 344.
Jennings *vs.* Whittaker, 4th Mon., p. 50.
Washburne's Am. Law of Real Prop., 3 vol., p. 178.
Western *vs.* Smith, 13th Cal. R., p. 419.
Witherspoon *vs.* Duncan, 4th Wallace, p. 218.
Marshall *vs.* Curran, 4th Cranch, p. 172.
Massie *vs.* Watts, 6th Cranch, p. 148.
Matson *vs.* Hord, 1st Wheat., 130.
Shipp *vs.* Miller, 2d Wheat., p. 316.
Act of Congress 29th May, 1830, 4th Stat. at Large, p. 420, s. 1, 3, 4, and 5.
United States *vs.* Fitzgerald, 15th Peters, p. 407.
Act of Congress of July 14, 1832, 4th St. at Large, p. 603, s. 1.

United States *vs.* Freeman, 3d How., p. 556.
Act of Congress of March 3, 1849, 9 Stat. at Large, p. 395. (Appellate jurisdiction of Sec. of Int. final and conclusive.)
McGwyre *vs.* Tyler, 1st Black., p. 195.
Johnson *vs.* Towsly, 13 Wallace, p. 85.

Second. The title to the Hot Springs has vested in the plaintiffs.

Johnson *vs.* Towsly, 13th Wallace, p. 85.
Lytle *vs.* Arkansas, 9th Howard, p. 333.
Nixx *vs.* Rector, 4th Ark., p. 283.
Finley *vs.* Woodruff, 3 Eng., p. 341.
G. G. R. R. Co. *vs.* Bryan, 8 Smead & Marshall, p. 268.
Cavender *vs.* Smith, 8 Iowa Rep., p. 360.
Wilcox *vs.* Jackson, 13th Peters, 511.
Witherspoon *vs.* Duncan, 4th Wallace, p. 218.
Isaacs *vs.* Steele, 3d Scam., p. 79.
Benner *vs.* Manlove, 3d Scam., p. 339.
Astron *vs.* Hammond, 3d McLean, p. 107.
Taylor *vs.* Brown, 5th Cranch, p. 234.
McArthur *vs.* Brooder, 4th Wheat., p. 488.
Brown's Lessee *vs.* Clements, 3d How., p. 666.
Stark *vs.* Starrs, 6th Wallace, p. 418.
Soulard *vs.* The U. States, 4th Peters, p. 512.
Barnard *vs.* Ashley, 18th How., p. 45. (Lytle case construed.)
2d vol. Black. Com., p. 154, (marginal.)
Hilliard on Real Prop., 1st vol., p. 380.
2d vol. Cruise's Digest, p. 33.
Hughes *vs.* Edwards, 9th Wheat., p. 489.
Territt *et al. vs.* Taylor, 9th Cranch, p. 43.

Third. The reservation act of 1832, construed with reference to the other acts of Congress bearing on the subject, does not impair nor conflict with the claim of the plaintiffs.

Act of July 14, 1832, 4th Stat. at Large, p. 603, s. 1.
Black. Com., 1st vol., p. 89, (marginal.)
Sedgwick on Stat. and Const. Law, p. 133.
Fletcher *vs.* Peck, 6th Cranch, p. 87. (Repeal of the statute under which a right has vested does not destroy the right.)
Act of July 11, 1870, 16th Stat. at Large, p. 149. (Confers jurisdiction on Court of Claims.)
Davis *vs.* Fontaine, 3d How., 636.
Bacon's Abridg., Title "Statute."
Webster *vs.* Cooper, 14th How., p. 488.
Murray *vs.* Gibson, 15th How., p. 433.
Morris *vs.* Miller, 6 Barn. & Creswell, 454–7.
U. States *vs.* Freeman, 3 How., p. 556.
Wilkinson *vs.* Leland, 2d Peters, p. 662.
U. States *vs.* Fitzgerald, 15th Peters, p. 407.
Rector *vs.* Gaines *et al.*, 19th Ark. Rep., p. 80.

Fourth. The alleged cancellation of the Belding entry does not impair or prejudice the validity of the same.

Carroll *vs.* Safford, 3d How., p. 460.
Witherspoon *vs.* Duncan, 4th Wallace, p. 218.

Fifth. There was no fraud in the entry nor fraudulent use of the certificate.

Record, pp. 521 and 522.

Sixth. No trust in the plaintiffs is established, as alleged, for the pretended foundations of the same, either the "Percifull claim" or the "Langlois claim," are insufficient.

Seventh. The pretended Cherokee title is equally worthless.

See Mr. Rose's argument on this point.

ARGUMENT.

For a clear and convincing argument, supporting in substance all the points above stated, the Court is respectfully

referred to the learned and logical brief of Mr. U. M. Rose, on file in this cause, on the part of the appellants. It is deemed unnecessary and inexpedient, in this brief, to attempt any improvement upon that argument.

There are one or two matters, however, not adverted to in the brief of Mr. Rose, which seem to be worthy of the attention of the Court.

The first is the recent decision of this Court in the case of Hutchings *vs.* Low and others, and its bearing upon the questions involved in this case. It is the Yosemite Valley suit, decided during the present term of this Court. In that case the Court hold that no vested right arises in favor of a settler on the public lands from occupation and cultivation, until the lands have been surveyed and offered for sale, and the claim properly proved, and the purchase money paid or tendered; in short, until the stipulated conditions are complied with by the settler.

But, on the other hand, the Court hold that when the claimant has done all in his power to comply with these conditions, he does acquire a vested right to the land. The Court proceed to show that the case of Lytle *vs.* Arkansas conforms to this ruling. The case at bar is within the rule here laid down, and, indeed, is exactly within the decision in the case of Lytle, as here explained. The only difference in the material facts of the Lytle case and the case of these appellants is, that whereas, in grant of 1,000 acres of land to the State of Arkansas, no specific tract or subdivision of land is named, in *this* case the act of reservation passed in 1832 does designate four sections of land including the Hot Springs. With this exception, the claim of Cloyes was precisely like the claim of Belding.

The subsequent acts of Congress, affecting the Hot Springs, seem to require that the reservation of 1832 must be construed so as not to affect existing pre-emption claims already vested according to the principles laid down in Hutchings *vs.* Low and others.

Secondly. The allegations of fraud, and the alleged fraudulent use of their certificate of entry on the part of the plaintiffs in attempting to oust the defendants by suits of ejectment, put forth in the printed brief of defendants' counsel.—(Brief, pp. 6, 7, 8, 10.)

What is the fraud imputed? Why, that on making application for leave to enter the land and receive the certificate, the plaintiffs stated that "of course, under the decision of the Secretary they should not ask for a patent."

This alleged statement if ever made, is easily explained, and furnishes not the least evidence of fraud.

If made to *the Commissioner*, as asserted, it had no influence on his mind, for his decision was against the application. (Record, p. 521.) It was no part of the application for the entry which is in the record at page 522. There is no evidence that it was before the Secretary of the Interior when, on appeal, he reversed the decision of the Commissioner. (Secretary's Decision, Record, p. 522.) It formed no part of the consideration on which the entry was permitted, and was not made a condition thereto. And as to the suits in ejectment being a fraudulent use of the certificate, the truth is just the reverse, for the Secretary's decision shows that he allowed it for the express purpose of putting the plaintiffs in "a position to contest the adverse claims of others to the same land." (Record, p. 522.)

This imputed "statement" first came to light in the *letter of the Commissioner* written after the Secretary had made his decision overruling him, the Commissioner, in which letter (transmitting the Secretary's decision to the local land officers) the Commissioner evinces a very decided animus to embarrass the proceedings, by directing his subordinates to make annotations not warranted by the decision of his chief.—(Record, p. 521.)

When this alleged "statement" was made, there was extant a decision of the Secretary sustaining the reservation act of 1832, and the letter of the Commissioner shows

that that decision was referred to in the statement. It was at most but a casual declaration to the effect that while that decision stood it would be idle to ask for a patent, and that if permitted to enter the lands for the purpose of contesting the claims of others, the plaintiffs would pursue that purpose. It is certainly a very strained construction to hold the parties pledged not to apply for a patent *after having successfully* tested the claims of other occupants, and altogether the whole matter is a weak foundation for a charge of fraud, and no cause for the application of the terms "a very scandalous transaction." (Defendant's brief, p. 10.)

But what have Hale and Rector to do with this? The United States are not a party to this suit, and it is not competent for the defendants to take their place.

Secretary Thompson, in his opinion refusing a patent to the plaintiffs, did not put his refusal on the ground that there had been any fraud or bad faith, but on the ground that the reservation act of 1832 excluded their claim. (Record, pp. 206, 208.)

Thirdly, as to the order of the Secretary of the Interior cancelling the Belding entry.—(Record, pp. 206, 208.)

It is not admitted in the answer of the plaintiffs to the supplemental bill of Hale, wherein the alleged cancellation is set up, that the entry was cancelled as a matter of fact, unless the opinion of the Secretary *proprio vigore* had that effect. There is no evidence in the record that the act of cancelling the entry ever was performed.

The opinion of Secretary Thompson was delivered about ten years after the entry of the Beldings had been made by permission of a former Secretary, and after it had been sustained (as against Hale and Rector) by the Supreme Court of Arkansas, and by this Court.

It was given at the instance of Rector (Rec., p. 205) at a very inopportune moment pending the litigation in this

Chancery suit, and was immediately made the subject of a supplemental bill therein.

And Secretary Thompson is mistaken when he says in his decision or opinion that the validity of the reservation act of 1832 had not been passed upon by a Court. The Supreme Court of Arkansas, a Court at that time of marked ability and learning, did decide against the reservation act, and in favor of the Belding claim, as against Rector—in fact, recognizing the pre-emption right of the plaintiffs. Had the United States been a party to that suit, the reasoning of the Court shows that the decision would have been the same.—(Rector *vs.* Gaines, 19th Ark., p. 80.)

The decision of Secretary Thompson was on an application for a patent. He had power to reject that application, leaving the status of the parties the same, but when he went farther, and laid his hands on an entry made ten years before and perfected by payment of the purchase money, &c., and ordered its cancellation, he was interfering with a vested right, and transcended his jurisdiction.

The plaintiffs in error, confidently hoping and believing that this Court will overrule objections to the jurisdiction and reverse the decision of the Supreme Court of the State, now formally ask that the appropriate process issuing out of this Court, may be granted and enforced, to give the plaintiffs possession under the decisions in their favor.

JAMES HUGHES,
Of Counsel for Plaintiffs.

BRIEF ON THE MOTION TO DISMISS FOR WANT OF JURISDICTION.

For the purposes of this motion, the statement of the case in the preceding brief is adopted, to which the court is respectfully referred. The attention of the court is also called to the assignment of errors in that brief.

To argue this motion as an original question of principle seems unnecessary, since the Lytle case, the case of

Hutchings *vs.* Low and others, and many other cases in the books, resembling in all essential points the case at bar, have furnished precedents decisive of the question.

The original bill in this case directly impugns the Belding pre-emption, and the answer of these plaintiffs sets it up as an affirmative defence; it is directly in issue, and was the main question in the case. The supplemental bill of Hale brings under review the Secretary's order of cancellation, and the answer thereto, without admitting the actual execution of the order, denies its legal effect to annul the entry. This is another material issue, introduced into the cause by the pleadings. The findings of the inferior Court show in detail that these questions were specifically passed on. The decree of the Supreme was made upon the record sent up from the inferior Court, without further pleadings or evidence.

JAMES HUGHES,
Of Counsel for Plaintiffs.

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ERROR TO THE SUPREME COURT OF ARKANSAS.

ARGUMENT FOR RECTOR, DEFENDANT IN ERROR.

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If the merits of this case are before the court for consideration, the principal question involved as between Henry M. Rector and the Heirs of Belding is, whether the New Madrid location in 1820, of the claim of Langlois was valid. Yet in any event, if Hale's claim is valid, or Belding's invalid, the heirs of Belding have no right to disturb Rector's possession. Wherefore we are compelled to consider each of the three claims.

We take first the New Madrid claim.

THE NEW MADRID CLAIM

OF

HENRY M. RECTOR, SOLE HEIR OF ELIAS RECTOR, UNDER FRANCOIS LANGLOIS.

The claim is to 170.14 acres of land, surveyed in a square in 1820, and having in the centre the Hot Springs of the Ouachita, in Arkansas.

HISTORY OF THE CASE.

In the year 1814 an earthquake shattered a large extent of country on the west side of the river Mississippi, including the county of New Madrid, in the Missouri Territory, and the lands on the Upper St Francois River, sinking large bodies of land, and forming lakes, and breaking up other lands with huge clefts and crevices, by which those confirmed to many settlers, under French and Spanish grants, were ruined or greatly injured.

One of these persons was FRANÇOIS LANGLOIS, who owned two hundred arpents of confirmed land in the county of New Madrid.

By the act of 17th February, 1815, (3 *Stat.*, 211,) Langlois became entitled to the same quantity of land, the sale of which might be authorized by law, anywhere in the Terri-

tory, proving the injury of his land to the Recorder of Land Titles at St. Louis, and getting his certificate. This claim he could *locate*, by applying to the principal Deputy Surveyor, and having surveyed the qu. .ity to which he was entitled. The Surveyor was required to send a plat of the tract so surveyed, with a notice designating the land, to the Recorder of Land Titles, and (as we understand the law,) to give the claimant a certificate, on filing which with the Recorder of Land Titles, the latter would issue a certificate entitling him to a patent. Upon such locations being made, the injured land was to revert to and become the property of the United States.

At that date there had been no public survey made or ordered, of any lands in the Territory. There was no Land Office and no Land District; and there was no order of the President to sell any lands in the Territory, until some time in 1823.

These claims, offering parties an opportunity to obtain titles to land, and as no one could *purchase* any from the Government, they were of course soon in commerce; and Langlois sold his to Joseph Story, and on the first of November, 1818, by instrument of writing, sealed, gave him power of attorney to locate the claim, for his own use and benefit; to sell, transfer, and convey it; to convey to the United States, or to their proper officer, the injured land, and to do in the premises whatever Langlois could, with power of substitution.

On the 16th of November, 1818, Langlois, by Story, proved what the law required, to the satisfaction of the Recorder of Land Titles, and so established his claim and right to locate, elsewhere, two hundred arpents of land; and, by Story as his attorney in fact, released, relinquished, and conveyed by deed, on that day, to the United States his said tract of land so confirmed to him as aforesaid, in said county of New Madrid; and the Recorder of Land Titles gave him a certificate, to the effect that he or his legal representatives were entitled to locate two hundred arpents of land on any of the public lands of that Territory, the sale of which might be authorized by law.

On the fourth of January, 1818, Joseph Story, as attorney in fact of Langlois, and also for himself, assigned and ceded to Samuel Hammond, all the right, title, claim, and interest of both, to or in the said certificate, and all the benefits and rights to be derived from it; the consideration being six

hundred and forty dollars, acknowledged to have been then paid. Since then Langlois has never been heard from or of in connection with the claim, except as stated in the next paragraph.

On the 12th of May, 1819, François Langlois and Barbara his wife, for the expressed consideration of two hundred dollars, conveyed to Story, his heirs and assigns, the injured tract of land, two hundred arpents, on Bayou St. John, in New Madrid county, *and all their rights, privileges, and advantages arising therefrom, under the act of* 1815; which conveyance was duly acknowledged, and then, or immediately after, duly recorded in that county.

On the 17th of January, 1819, Samuel Hammond and Elias Rector applied in writing to the Surveyor General for the Territory of Missouri, "for the entry and donation of two hundred arpents of land, to satisfy the said certificate, to be surveyed in a square tract, and so described as to include the Hot Springs."

The Surveyor General ordered the survey, and it was made by James S. Conway, a deputy surveyor, afterward Surveyor General of Arkansas and first Governor of that State, who marked the lines and made out in triplicate a plat and notes of the survey, certified them, and deposited one in the office of the said Surveyor General, and delivered the others to the claimant's assignees—Hammond and Rector. The copy so deposited was registered, and remained in that office until it was transmitted to the Surveyor General's office, at Little Rock, in 1832.

On the 19th of February, 1819, in consideration of six hundred dollars, Samuel Hammond and Eliza his wife conveyed by deed to Elias Rector an undivided moiety of said certificate, and of the rights and interests accruing and arising from the same, and of the lands that had been located with it, which conveyance was duly acknowledged, and was recorded in the county of Clark, in the Territory of Arkansas, on the 19th of May, 1820.

On the 24th of February, 1821, Story conveyed by deed to Hammond and Rector his right, title, and interest in the certificate, with covenant of warranty; which conveyance was duly acknowledged, and was recorded in said county of Clark (in which the Hot Spring were) on the 22d of July, 1821.

The survey was regularly made on the ground, and the marks are in part visible yet. It was regularly and in proper

form returned to the office of the Surveyor General at St. Louis. But the land on which the location was made not having been surveyed, nor directed to be surveyed, and the survey, therefore, not conforming to the lines of the public surveys; and all such surveys being declared by the Attorney General irregular, illegal, and void; and the said Surveyor General being at the very time of receiving said survey advised not to grant any certificate where patent could not issue; and it being decided by the Attorney General and Secretary of the Treasury that the land in question was not land, "the sale of which was authorized by law," the said plats and notes of survey could not be approved, nor filed, but only deposited in the office of the Surveyor General, nor recorded there, nor transmitted to the Recorder of Land Titles, nor recorded by him, nor any certificate be issued by the said Recorder of Land Titles, or the Surveyor General, to enable or assist the said Samuel Hammond and Elias Rector to obtain a patent; and nothing more could be done than to deposit a copy of said plat and notes, certified, retain the other copies in their own hands, as evidence of their title, and wait until the obstacles interposed should be removed by legislation of Congress or decision of the Supreme Court. Which obstacles, removed in 1822, so far as regarded the non-conformity of the location to the section lines, remained as to the rest, and were increased in 1825, by decision of the Secretary of the Treasury, on the opinion of the Attorney General, that such locations could only be made upon lands, the sale of which was authorized by law on the 17th of February, 1815, and that the Quapaw Indian title to them not being then extinguished, the sale of the lands including the Hot Springs, was not then authorized by law.

On the 2d of March, 1827, by an act supplementary to the act of 1822, (4 *Stat.*, 219,) it was enacted that. "the locations of land heretofore made according to law, by virtue of warrants issued under the act" of February, 1815, and not exceeding six hundred and forty acres in the whole to any one sufferer, should be perfected into grants, in the manner prescribed by that act, any construction of it to the contrary notwithstanding.

On the 1st of February, 1838, upon an application by Matthew Cunningham to enter lands composing part of the town of Little Rock, and on which the New Madrid claims of Peter Porier and Eloi Dejarlois had been located in 1820,

(the Quapaw title to these lands not having been extinguished until August 24, 1818,) the Commissioner of the General Land Office answered that the act aforesaid, of March 2, 1827, *confirmed these locations;* and, as they were merely voidable and not void, on the 25th of December, 1824, Cunningham could not then legally enter the land, and the New Madrid locations, subsequently confirmed, must hold it.

And the Attorney General, upon appeal taken to him, decided, on the 5th day of April, 1838, that the said act of March 2, 1827, confirmed the said locations.

On the 11th of June, 1838, the Commissioner of the General Land Office again decided that the said Porier had made no other valid location, and therefore his location on the said lands was good in any event, and at any rate both locations were cured by the act of 1827; and, upon appeal, on the 3d of July, 1838, the Secretary of the Treasury affirmed the decision of the Commissioner, saying that it was unnecessary to take the opinion of the Attorney General.

The locations of Porier and Dejarlois were in excess of quantity—that is, covered more than the quantity of land owned by them respectively in New Madrid county; but both were also located on land, the Indian title to which had not been extinguished in 1815; and each was located without any regard to the lines of the public surveys.

But, on the 18th of September, 1839, the Commissioner of the General Land Office decided that the said locations were void, because located on lands the Indian title to which was not extinguished until 1818; and on the 24th of September, 1839, the Secretary of the Treasury affirmed this decision.

Little Rock, the capital of the State of Arkansas, began to be settled in the year 1820, the lands composing it and in the vicinity west of the line of the Quapaw reservation made by the treaty of August 24, 1818, having then been surveyed. The Hot Springs lie about fifty-five miles southwestwardly from it.

The act of March 17, 1820, (3 *Stat.*, 554,) authorized the appointment of a Register and Receiver for the Lawrence Land District, and in the latter part of 1820 those officers received testimony to establish pre-emptions south of the Arkansas river. On the 20th of November, 1821, the town of Little Rock was surveyed and laid out in blocks and lots.

The seat of government of the Territory was removed to it from the Post of Arkansas by act of the Territorial Legislature of 18th October, 1820.

On the 13th of June, 1823, the President proclaimed a sale of public lands south of the Arkansas river, which he did under the authority given him by the act of February 17, 1818, making provision for the establishment of additional land offices in the Territory of Missouri, (3 *Stat.*, 406,) and by which he was *authorized* to open the land office for the Lawrence Land District, in the district or county of Arkansas, as soon as lands sufficient to warrant it should have been surveyed, and to direct, at any time, so much of the lands in that district as should have been surveyed according to law to be offered for sale; the only act which had been thereafter enacted on the subject being that of April 24, 1820, making further provision for the sale of the public lands, which did not affect the authority given by the former act. (3 *Stat.*, 566.)

The county of Arkansas was created by act of the Territorial Legislature of Missouri, on the 31st of December, 1818, and included all the country between New Madrid county and the Louisiana line; and the counties of Hempstead and Clark, in the Territory of Arkansas, were created before the making of the said survey of the Langlois claim; and public surveys were in process of execution south of the Arkansas river preparatory to sale, before the treaty of 1818 with the Quapaws.

The objection to the location of the claim of Langlois, that the sale of the lands on which it was located, was not authorized by law on the 17th of February, 1815, because the Quapaw title had not then been extinguished, with the other objections not removed by the act of 1822, continued to be maintained and insisted on by the Government, and was by the Commissioner of the General Land Office and Secretary of the Treasury at different times reiterated and applied, until the passage of the act of March 1, 1843, which will be hereinafter more particularly considered; and, as late as the year 1851, it was reiterated by a Secretary of the Interior as one of two reasons given for refusing a patent on this claim.

And meanwhile, on the 20th of April, 1832, by the third section of the act entitled "An act authorizing the Governor of the Territory of Arkansas to lease the Salt Springs in said Territory, and for other purposes," the Hot Springs, with

four sections of land including them, were reserved for the future disposal of the United States, and it was provided that they should not be *entered*, *located*, or *appropriated*, for any other purpose whatever. (4 *Stat.*, 505.)

The lands adjacent to the Hot Springs contain immense masses of magnetic iron ore, which so affected the compass that they could not by means of it be surveyed, and they were left unsurveyed in consequence until 1837. It being then determined to survey them, the Surveyor General for Arkansas ordered a re-survey of the Langlois location, the marks of the survey whereof, made in 1820, were partly obliterated, but in part still remained visible and legible; which re-survey was ordered by the Surveyor General, under general instructions of long standing, in order to close and abut the lines of the public surveys on the boundary lines of that survey: such re-survey of private surveys being always preliminary to surveys of the adjoining lands.

The Langlois location was accordingly surveyed anew by the deputy surveyor, (not by retracing the old lines, but by the application,) and a plat and field notes duly certified, thereof, returned by such deputy surveyor, dated February 28, 1838, which was approved by the Surveyor General on the 23d of April, 1838, and transmitted to the office of the Recorder of Land Titles at St. Louis, where it was recorded on the 16th of June, 1838, and certificate of that officer granted and delivered to Rector, to entitle him to the patent.

But now not only the original objection of Indian title was in the way, but also the act of 1832, reserving the land for the future disposal of the United States; and Congress again legislated. On the 1st of March, 1843, an act was passed, the first section of which provided that the locations theretofore made under the act of 1815, on land on the south side of the Arkansas river, if made in pursuance of the provisions of that act in other respects, should be perfected into grants in like manner as if the Indian title had been extinguished at the time of the passage of said act. The only exception to this general provision was in the second section, that if any such location had been *sold*, and the lands so located *appropriated* by the United States, the holders of the New Madrid warrants should have the right to locate them on other lands. (5 *Stat.*, 603)

Soon after the survey of the lands applied for by Hammond and Elias Rector, in 1820, the former, who had before then sold an interest of one-half in said claim to the latter,

sold him his remaining interest, and was afterwards heard of no more in connection with the case. Langlois has never since 1818 set up any claim to any interest in the location or lands located, or repudiated the action of Story, as his attorney in fact, or made any reclamation whatever; nor has Hammond, since July, 1820, preferred or pretended to any interest, or joined in any measures taken to enforce the said claim; but the same was prosecuted by the said Elias Rector alone during his life time, and since his death has been prosecuted by the petitioner alone, who is his only son and sole heir at law.

In the year 1849, after long investigation of the pretended pre-emption claims, Rector still urging the issuance of a patent to him, the matter was referred to Mr. Attorney General Johnson, who, in April and May, 1850, decided that the petitioner was entitled to the patent, even under the act of 1843 alone, waiving all other grounds; and Mr. Secretary of the Interior Ewing, sent the papers to the General Land Office, with directions for the patent to issue; but the pre-emption claim of the heirs of Ludovicus Belding, under the act of 1830, was thrust in the way, and the order for issuance of the patent was suspended; and in 1850 the whole matter came to the hands of Mr. Secretary of the Interior Stuart, who decided, first, that the location of the claim of Langlois was made on lands, the sale of which was not authorized by law on the 17th of February, 1815; and, second, that the act of 1832, reserving the Hot Springs from sale or entry, was not repealed or done away with by that of 1843, confirming all New Madrid locations south of the Arkansas river.

After which, Rector filed ample proof of the survey of 1820, and asked a reconsideration by the Secretary of the Interior, who referred the whole matter to Mr. Attorney General Cushing, who decided that the first objection taken by Mr. Secretary Stuart amounted to nothing, the location being valid if made on lands the sale of which was authorized by law at the time of the location; but that the second objection was valid, if there had been no valid location of the claim prior to the passage of the act of 1822. (6 *Opinions of Attos. Gen.*, 697.)

In the year 1850, Rector found that the plat and notes of survey made out and certified in triplicate, and all in his own handwriting, by James S. Conway, deputy surveyor, in 1820, and one copy of which had been by him deposited

in the Surveyor General's Office at St. Louis, and which had been, in 1832, transmitted with other papers to the Surveyor General's Office at Little Rock, and there been received and kept, remaining on file there at least until 1838, was no longer to be found in that office, having in some manner been lost, destroyed, or taken away. Whereupon he filed in that office the two other originals, furnished in July, 1820, by the same Deputy Surveyor to the said Hammond and Elias Rector, which were received on deposit in the said office as private papers only, and in September of that year withdrew one of them and filed it in the General Land Office, where it yet remains.

The fact of which prior survey being represented to Mr. Attorney General Cushing, he advised the Secretary of the Interior that the documents in regard to that prior survey raised a question of fact, which, in justice to Rector, ought to receive the careful consideration of the Department; and he decided that, with the reservation of the fresh points of inquiry thus presented, none of the claimants had a valid claim to the Hot Springs; and that the decision of Mr. Secretary Stuart ought to stand, unless, upon full examination of the new case presented in behalf of Rector, it should appear that he had acquired a title, under Langlois, of date anterior to the time when the land was reserved. (6 *Ops. of Attos. Gen.*, 697 *to* 711.)

After Mr. Secretary Stuart had decided the fraudulent pre-emption claim of the heirs of Ludovicus Belding to be of no validity, he was induced, upon the advice of Mr. Attorney General Crittenden, and, notwithstanding the act of 1832, reserving the lands in question for the future disposal of the United States, to permit those heirs to pay the purchase money for one hundred and sixty acres of land, including the said Springs, under the pre-emption act of the year 1830, and to receive a certificate of entry and purchase thereupon, upon their agreeing, and it being endorsed on the certificate, that they were not to ask for a patent for the same; which certificate the said Secretary Stuart refused to recall, when Rector protested against it to him and to the Attorney General, as giving the said heirs, under the specious pretence of putting them on an equal footing with the other claimants, the means of vexing and harassing them by actions of ejectment, in which the said certificate would be, under the laws of Arkansas, good and sufficient evidence of right of possession, sufficient to maintain such actions; and

though the Attorney General was told that to give such certificate was a shameful abuse of power, in violation of law, to subserve private interests; as it was.

Armed with which certificate, and having ample means, William H. Gaines, who married one of the said heirs, did institute suits against Rector and others, and a litigation commenced which continued until suspended by the war, recommenced at its close, and is not yet completed, although the said certificate has been cancelled, and the fraudulent use made of it has been condemned.

In consequence of the existence of which certificate and the growing up of such litigation, no decision in regard to Rector's claim was made in the Department of the Interior, although he fully proved said survey of 1820, and efforts were made by him, before and since the war, to obtain the passage of a law authorizing some judicial tribunal to adjudicate upon his and the other claims to the said Hot Springs and adjacent lands.

These are the leading facts on which the case is founded. There are other facts, auxiliary to these, and bearing both on the questions of fact and the questions of law involved, which will be stated in their proper place.

3d. The Argument on the Facts.

The Act of Congress, which it will be convenient to refer to hereafter as the New Madrid Act, of February 17, 1815, (3 *Stat.* 211.) sec. 2, provided that the "*location*" of a claim under it should be made, *on the application* of the claimant (it is not said to whom), by the Principal Deputy Surveyor for the Territory of Missouri, (whom the Surveyor General

of Illinois and Missouri succeeded, in 1816,) or under his direction.

It then proceeds, parenthetically, to direct what shall be *the duty of that officer*, in these words: "Whose duty it shall be to cause a survey thereof to be made, *and to return a plat of such location made*, to the said Recorder, *together with a notice in writing, designating the tract or tracts thus located, and the name of the claimant on whose behalf the same shall be made.*"

And it then prescribes the duty of the Recorder (of Land Titles at St. Louis,) on receiving such plat and notice, in these words: "which notice and plat the said Recorder shall cause to be recorded in his office," &c., the residue of the section providing for the fees of the Recorder and Surveyor, both to be paid by the claimant.

The 3d section made it the duty of the Recorder of Land Titles to transmit a report of the claims allowed, and locations made, to the Commissioner of the General Land Office; and then follows this singular provision: "and shall deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent for the tract therein designated, *which certificate shall be filed with the said Recorder within twelve months after date, and the Recorder shall thereupon issue a certificate in favor of the party, which certificate being transmitted to the Commissioner of the General Land Office, shall entitle the party to a patent, to be issued in like manner as is provided by law for other public lands of the United States.*"

It is not credible that the claimant was required to procure a certificate from the Recorder that he was entitled to a patent, and yet that he could not, on this, ask for a patent, but must file it within twelve months with the *Recorder*, in order to obtain a new one to the same effect, in lieu of it, and on that be able to have his patent.

Evidently the redaction of the statute is grossly vicious: and if *two* certificates in succession were intended to be required, the first must have been intended to be given by the Principal Deputy Surveyor. And this was reasonable, because, although a copy of the survey and plat, with a statement or report, by that officer, was to be forwarded to the Recorder of Land Titles, the party would, without such a certificate, have in his own hands no evidence of his location and title, which he could exhibit, if he desired to sell.

All the claimant had to *do*, at any rate, to effect a location and become owner of the land selected by him, was to apply to the Principal Deputy Surveyor to make the survey. So

soon as that was made his title was complete. The land located, the Supreme Court said in *Bagnell* v. *Broderick*, 13 *Peters*, 436, is not deemed to be appropriated by him *until the survey is returned, the plat and certificate of survey being the only evidence of location recognized by the Government.*

In this case it is proven that the survey was ordered to be made by the Surveyor General. If that could not now be proven, it would be presumed, upon proof that the survey was really made. It is proven that the survey was made, and that copies of the plat and field-notes, certified by James S. Conway, Deputy Surveyor, afterwards in 1832 and for several years after Surveyor General for Arkansas, were duly made out, to the number of three, each being an original, one of which was returned to and deposited in the Surveyor General's Office at St. Louis, and two others were, in 1850, in the possession of Henry M. Rector, who then filed them in the Surveyor General's Office at Little Rock, and afterwards withdrew one of them and filed it in the General Land Office.

It is proven that the copy filed in the office of the Surveyor General at St. Louis was in that of the Surveyor General at Little Rock, after the transfer of the papers, files and records from the former to the latter, upon its establishment in 1832. It may have been that it was taken out at the time of the re-survey, and lost or destroyed. At all events, it had disappeared in 1850. It was of no more authenticity, and had no more an official character, than the originals in the custody of the party himself; for it had never been, as we shall show, in the *official* custody of the Surveyor General, and a copy of it certified by him would not have been evidence. It had been made out, certified by the Deputy Surveyor, and returned, and, if the location was a legal one, or afterwards legalized, the land was severed from the public domain, and title complete.

The genuineness of the signature and certificate of James S. Conway is proven beyond the possibility of a doubt; and the water-marks upon the paper, testimony that cannot lie, prove its age, and that it was *official* paper. The marks of the old survey, recognizable still at the time of the re-survey in 1838, make the proof of the survey complete. If it were necessary, the legal presumption would come in aid of it, that, as the survey was applied for, and it was the *duty* of the Surveyor General to cause it to be made, he did so, since, as we shall show, he thought such a location valid, and con-

tested the views of Mr. Wirt to the contrary. General William Rector was the brother of Elias Rector, and James S. Conway a connection by marriage and an intimate friend, which facts tend to explain why the latter was selected to make the survey, and why he was willing to make the long journey through an unsettled country, necessary to the doing it. It is not likely that anything was omitted, that could lawfully and properly be done, to make the location effectual; nor that James S. Conway, when made Surveyor General in 1832, would have neglected to preserve the evidence of his survey of 1820.

The principal attack upon Rector's claim has always been directed against what has been regarded as its weak point, the failure of the Surveyor General of Illinois and Missouri to cause to be recorded in his office the plat and notes of the survey of 1820; its non-transmission, with the required notice from him, to the Recorder of Land Titles, the absence of any record of it in the office of that Recorder, and the failure of the assignees of the claimant to see that these things were done, and to obtain the proper certificate from the Recorder; coupled with the production of the two copies of the surveys of the claimant himself in 1850. We need not repeat the inferences deduced from these facts.

None of the surveys sent from Missouri to Arkansas were recorded in the office of the Surveyor General at Little Rock until the year 1843. But this survey of 1820 was *registered* or scheduled, both in the office at St. Louis, and in that at Little Rock, as survey No. 2,093, on the register or schedule of each office. This concurs with the other testimony to prove not only that the survey was actually made, not only, also, that it was *returned*, but, also, that it was deposited in the office of the Surveyor General at St. Louis, taken charge of and kept there, although not *recorded* in the book kept for such records, and although no other of the steps required by law were taken with or upon it.

It is necessary for us to explain why no action was had upon it, and why it was treated as a private survey, not entitled to record.

Now, there is a complete and perfect reply to be made to these objections, which will fully explain why the survey of 1820 was not transmitted to the office of the Recorder of Land Titles with the "notice" from the Surveyor General, prescribed by law, and why it was not recorded in the office of the Surveyor General; and this reply will be sufficient,

also, if the court should fail to find that it was officially approved by the Surveyor General, as it would be equally complete and perfect if no copy of the plat and notes of survey had ever been filed or deposited in the Surveyor General's office, but the only copies made had been delivered to the parties themselves, and retained in their custody.

This ample explanation will consist of a recital of matters of fact, as to instructions given and decisions made, without any argument of law, although it will be necessary to the explanation of these instructions and decisions, and in order that their full significance and pertinence may be understood, to refer to and quote the provisions of more than one statute. We will endeavor not to go beyond the province of an argument on the facts.

The language of the act of February 17, 1815, was, "shall be and they are hereby authorized to locate the like quantity of land *on any of the public lands of the said Territory, the sale of which* IS *authorized by law.*"

The office of Surveyor General was created by the act of May 18, 1796, (1 *Stat.*, 464, §1,) his duty being to cause to be surveyed the lands northwest of the Ohio and above the mouth of the Kentucky.

By the act of February 18, 1806, (2 *Stat.*, 352, §1,) the powers of the Surveyor General were extended over the public lands in the Territory of Louisiana, (which became the Territory of Missouri when the State of Louisiana was created,) and he was required to appoint deputies in that Territory, one of whom was to be his principal deputy.

The act of April 29, 1816, (3 *Stat.*, 325,) provided for the appointment of a Surveyor (afterwards called "Surveyor General") of the lands of the United States in the Territories of Illinois and Missouri, with the same powers as the Surveyor General of the lands northwest of the Ohio and above the mouth of the Kentucky river. It was required that he should "transmit to the Registers of the Land Offices within the said Territories, respectively, general and particular plats *of all the land surveyed, or to be surveyed,*" and also "forward copies of said plats to the Commissioner of the General Land Office." And it was provided that all the plats of surveys belonging to any office theretofore established or authorized for the purpose of executing or recording surveys of lands in those Territories should be delivered to him; and any plat of survey duly certified by him should be ad-

mitted as evidence in the courts of the United States or Territories.

The act of 1796, creating the office of Surveyor General, (§2,) required that the plats of the public surveys should be "recorded in books, to be kept for that purpose," in the office of the Surveyor General; but the act of 1806, (§2,) extending his powers over the Territory of Louisiana, and requiring plats of surveys theretofore made to be delivered to his principal deputy, only provided that no plat of survey should be evidence unless certified by such principal deputy "to be a true copy of the record in his office." 2 *Stat.*, 352.

No provision of law that we can find required the Surveyor General of Missouri to record in a book the surveys of New Madrid locations. Those of French and Spanish claims, of which confirmation was sought, though made by order of that officer, and his deputies, were declared by the statute of February 28, 1826, to be merely private surveys. By the same act *no* plat of survey would be admitted as evidence *in any court of justice*, unless certified by the principal deputy to be a true copy of the record in his office; and by the act of April 29, 1816, *any* plat of survey, duly certified by the Surveyor General, was admissible as evidence. By the same act the Surveyor General was required to transmit the general and particular plats of all lands surveyed, or to be surveyed, to the Registers—particular plats meaning plats of claims, as contradistinguished from general surveys of the public lands. All provisions of laws conflicting with this were repealed; and therefore it could not well be believed that the plat of the survey of Langlois' claim ought to be forwarded to the office of the Recorder of Land Titles.

The country in which the Hot Springs lay had not been surveyed, either in 1815 or 1820, nor was it surveyed until after 1837. Consequently the Langlois claim for 170.14 acres could not be located according to the lines of the public surveys; and, if located in a square, it would necessarily cause the public surveys on its sides to contain fractions of sections of different dimensions.

The act of April 26, 1822, (3 *Stat.*, 668,) confirmed locations theretofore made, *if made in pursuance of the act of* 1815 *in other respects*, and provided that they should be perfected into grants in like manner as if they had conformed to the public surveys—subsequent locators being bound to conform to those lines.

But the questions still remained, of what lands was the sale authorized by law? must the sale have been authorized by law on the 17th of February, 1815? and *when* does the sale of lands become authorized by law?

It is to be added, that the Quapaw pretence of title to the lands in all the Ouachita River country was extinguished by treaty of August 24, 1818.

On the 10th of July, 1816, the Commissioner of the General Land Office instructed the Surveyor General at St. Louis, that the act of March 3, 1811, section 8, had directed that certain lands in the Territory of Louisiana should be surveyed; section 9 had directed that a land office should be established; and section 10 had directed that the land so surveyed should be offered for sale: wherefore, he decided, "*the tract of land which has been directed to be surveyed, for the purpose of being offered for sale at St. Louis, appears to be the tract upon which the locations are to be made. Laws, Instructions, and Opinions, printed by Gales & Seaton, in* 1838, *by order of the Senate, vol.* 2, *p.* 820.

But he also advised the Surveyor General that, prior to the survey of the lands that were to be sold at St. Louis, the act of 1815 might be fairly construed to leave the form of the survey to the discretion of the surveyor. *Id.*, 821.

By the 8th section of the act of March 3, 1811, (2 *Stat.*, 665,) the Surveyor General was directed to cause such of the public lands in the Territory of Louisiana, *as the President of the United States shall direct*, to be surveyed and divided, in the manner provided by law as to the lands northwest of the Ohio and above the River Kentucky.

Now, at the date of the passage of the New Madrid act, (February 17, 1815,) *the President had not directed a single foot of land to be surveyed* in Missouri. Consequently, if New Madrid claims could only be located on land the sale of which *was* authorized by law when the act of February 17, 1815 was enacted, and if the sale of lands was not authorized until they were surveyed, *there was not a single foot of land in Missouri on which a claimant could*, without a new law to authorize it, *locate his claim;* and the act of 1815 was utterly worthless to any one.

For the very first direction for the survey of lands in that Territory was given on the 23d of March, 1815, by letter from the Commissioner of the General Land Office to the Surveyor General at Chillicothe, by which the latter was instructed to direct the principal deputy surveyors of the Ter-

ritory of Missouri to survey into townships and sections such part of that Territory as would include the principal part of the private claims—*i. e.*, of the French and Spanish claims. *Instr. and Opin.*, 809.

On the 24th and 27th of March, 1815, the Commissioner instructed the Surveyor General at Chillicothe in regard to surveying as soon as possible two millions of acres of military lands (bounties to soldiers), between the Rivers Mississippi and Arkansas. *Instr. and Opin.*, 809, 810.

And it was not until the 6th of March, 1816, that the Commissioner of the General Land Office by letter informed the same Surveyor General that the President of the United States had directed that about one hundred townships should be surveyed and prepared for sale in the Territory of Missouri, *in the vicinity of St. Louis*, in addition to the surveys [of military lands] into townships before directed, surveying first the lands between the Mississippi and Missouri Rivers, ceded by the Sac and Fox Indians; and the residue of the one hundred townships in some other part of the Territory, *in the vicinity of St. Louis*. If the lands between the Mississippi and Missouri had been surveyed into townships under former directions, they were to be subdivided for sale, and an additional survey into townships might be made in some other part of the territory, for the purpose of ascertaining the character of the country, and private claims. Thus, he said, the directions of the President would be obeyed, viz: to survey into townships two hundred townships, and into sections one hundred townships. *Instr. & Opin.*, 812.

No directions to survey other lands were given until after the year 1820; none, indeed, for several years afterwards. And in 1820 these instructions of the Commissioner, so far as we can learn, remained unchanged. While they stood in the way it was quite evident that no location of lands not surveyed need be attempted. The decision that these locations must conform to the lines of the public surveys was not changed by law until 26th April, 1822.

The President directed no sale of lands in the Territory until 1823.

The Surveyor General considered, of course, that it was contrary to his duty to treat such locations as of any validity, to certify the plats for record, or give any certificate on which the party might proceed to procure a patent. And this appears from the fact that, on the 15th of April, 1817, the Commissioner of the General Land Office said, in an

official letter to the Surveyor General at St. Louis, "I approve of your determination, *not to furnish the Madrid claimants with any documents*, to enable them to apply for patents, until you have clearly ascertained that their locations do not conflict with prior claims." And he further expressed the opinion, that lands which the President had not directed to be prepared for sale, could not with propriety be deemed lands, "the sale of which is authorized by law."

On the 5th of July, 1820, the Commissioner of the General Land Office furnished the Surveyor General at St. Louis with copies of opinions given by the Attorney General, and informed him that the Secretary of the Treasury directed that locations which had been made, which were not conformable to law, might be withdrawn or amended, so as to conform to sectional lines.—*Same Vol., p.* 820.

On the 2d of September, 1820, the Commissioner wrote to the Surveyor General, "Your view of the law relative to New Madrid claims, and your reasoning on that subject, correspond with my own; but the opinion of the Attorney General will prevent patents issuing on certain locations which he has declared illegal." Congress, he thought, would legalize the locations, and so prevent confusion, injury and trouble.—*Id.*, 822.

Thus it appears that the Surveyor General was not of the same opinion as Attorney General Wirt; and this explains why he had been willing to order the survey asked for, of the Langlois claim.

The first opinion of Mr. Wirt, forwarded with the letter of 5th July, 1820, was given on the 11th of May of that year, to the Secretary of the Treasury, and decided that the locations under the New Madrid Act *must conform with the general plan of surveying the public land.*—*Id.*, 10.

The second was given on the 19th of June; reiterating the former decision, and held that it was wholly inadmissible to patent locations made in a square, previous to the sectional lines being run. He said: "The sale is not *authorized by law* until the sectional lines are run, *and consequently all locations previously made by these sufferers are unauthorized*; the circumstances of their being located in a square being perfectly immaterial to the policy of the law."—*Instr. & Opin.*, 10.

And by the third opinion he decided that the fundamental defect still remained, that the locations were made on lands the sale of which was not authorized by law; wherefore

they were made *without authority*, and were *void;* and patents, consequently, could not issue on them. He said, "The contemporaneous survey of these *void* locations, with the general survey, *and the permitting them to produce the effect of causing fractions in the general survey*, was *unauthorized by law;*" and that the sale of the fractions so caused, was *illegal* and *void*, because the public law, of which every one was bound to take notice, authorized no such fractions from such a cause; wherefore the sales ought to be set aside, and the sections subdivided according to law.

All these opinions were referred by the Secretary of the Treasury to the Commissioner of the General Land Office, who, in the reference to him of the third opinion, was directed to conform to the second, of which the third was confirmatory.—*Instr. & Opin.*, 13, 14.

And the Commissioner, so ordered to conform to these opinions, transmitted copies, as we have seen, to the Surveyor General at St. Louis, that he, also, might be governed by them.

The *order* to survey the Langlois claim had been given, and the survey *made*, before these opinions reached the Surveyor General, whose opinion had been, as we have seen, that locations in a square, on lands not surveyed, were legal, the Commissioner having expressed to him that opinion.

But within a day or two of the date and return of the survey, perhaps on the same day, certainly only a day or two before or after, came these opinions and explicit instructions. They absolutely forbade his approving the survey; for he could not *approve* a location which he was ordered to consider illegal. He could not accept it as an official survey, for his order for making it, and the survey itself, were declared void. It would cause fractions in the further surveys, unauthorized by law. The Recorder of Land Titles, or a Register, would have no right to receive and record it. No certificate would issue on it. There was the same reason for withholding any certificate as had existed in other cases where the Surveyor General had withheld certificates, and his action been approved.

It is also to be noted that on the 27th of November, 1818, the Secretary of the Treasury decided that the pre-emption act of April 12, 1814, could not, by any just construction, be extended to lands not within the organized limits of the Territory of Missouri: that Howard County was not in 1814 within the limits of any County within the Territory;

and that the Territory of Missouri, within the meaning of that act, was the Territory as organized into Counties, inasmuch as any other construction might give rise to claims through the whole extent of country from the River Mississippi to the Pacific Ocean.—See Letter to the Commissioner of the Land Office, *Instr. & Opin.*, 296.

The Secretary of the Treasury ordered the opinions of the Attorney General to be conformed to by the Commissioner of the General Land Office, four years after the latter had informed the Surveyor General at St. Louis that the only land subject to location by the New Madrid claims was that *which had been directed to be surveyed, for the purpose of being offered for sale at St. Louis;* and three years after he had advised the same officer to adhere to his determination not to furnish the New Madrid claimants *with any documents to enable them to apply for patents* until he had clearly ascertained that their locations did not conflict with prior claims; because, in such cases the locations were on lands, the sale of which was not authorized by law.

And, on the 5th of July, 1820, the opinions of Attorney General Wirt were forwarded from Washington to the Surveyor General at St. Louis, with directions from the Secretary of the Treasury, that locations of New Madrid claims, not conformable to the lines of the public surveys, might be withdrawn or amended so as to conform to the sectional lines.

The Surveyor General thought such locations as that of Langlois valid. That was material, as he had ordered the survey in that case, which he would not have done if he had believed it would be void.

As the Commissioner wrote him on the 2d of September, it was probable that Congress would, at its next session, legalize such locations. It was not a direction; he said, also, that the locations *should* not be withdrawn, but that they *might;* and he presumed the holders of them would wait to see what would be done at the next session of Congress.

It required ten or twelve days for a letter to reach St. Louis from Washington—that is, the letter of 5th July was probably received there about 15th or 17th. Just at this moment came the survey of the Langlois claim, dated the 16th.

The Surveyor General was authoritatively instructed that the location was void, which was, of course, to instruct him that he had had no power to order the survey of the tract

applied for. The survey was, therefore, not an official survey, but merely a private one. He could not receive it as official, and place it among the records in his office. Under the decision, it could have no right to be there. He could not approve it and send it as official to the Recorder of Land Titles. That officer could have nothing to do with it. He could not record it, much less issue a patent certificate upon it. He could not send it to the General Land Office. He could, at the utmost, permit it to be *deposited* for safe-keeping and *possible* future use in his office, and even that he was under no manner of *obligation* to do. The anticipation of action by Congress, legalizing the location would permit, but not require, him to take charge of it.

But, also, the assignees of the claimant had confidence that the location was valid. The Surveyor General believed the decisions of the Attorney General wrong. The Commissioner of the General Land Office, it afterwards appeared, did so likewise. The claimants were not compelled to abandon the location. They could have the survey deposited in the Surveyor General's Office if he would receive it as a private survey, and they could procure the surveyor, who made the survey, to give them certified copies, to be retained by themselves, as evidence of the location.

Hammond and Rector had the right to *demand* copies of the survey from Conway, and to retain them in their possession. The law expressly gave them that right. Sec. 13, of act of 26 March, 1804, (2 *Stat.*, 280,) every deputy surveyor was declared to be entitled to receive from the purchaser of any tract of land, the lines whereof he had run and marked, at the rate of three dollars a mile, for every mile surveyed and marked, *before he should deliver to him a copy of the plat of such tract, stating its contents.* It was the *purchaser*, by that act, who was to lodge with the Register a plat of the tract, *certified by the District* Surveyor. By the act of 28th February, 1806, every deputy surveyor in the Territory of Louisiana had to take an oath or affirmation truly and faithfully to discharge the duties of his office.

That is just what they did. It is proven that they did procure the deposite in the office of one copy of the plat and survey, and received others for themselves. As one was deposited, it will be presumed to have been lost, since, being but a private paper, no great care would be likely to be taken of it. If it was deposited it has disappeared. If it had not been deposited the presumption would be that the

surveyor refused to receive it, as being wholly unofficial and void. In either case, the parties had full and perfect right to rely on their location, and to take into their own custody and preserve the evidences of it. It is of not the least importance whether a copy was deposited in the office or not. If one was, it was only of the same dignity with those retained by the parties. Each was an original, and all were deemed merely private papers, evidences of a private survey.

Congress, in April, 1822, removed the objection that the location did not conform to the lines of the public surveys; but there still remained the objection, decided by the Attorney General on the 19th of June, 1820, to be fatal, that sale of lands was not authorized by law, until the sectional lines were run, and that consequently all locations made before then were *unauthorized*. The order of survey of the Langlois claim was therefore (if the decision was correct) an invalid order, and what was done under it void.

And there was another objection, even more fatal, that the lands south of the Arkansas were Indian lands, and not subject to be taken by New Madrid claimants, at the date of the treaty; at which time the sale of the lands must have been authorized, it was held, to make the selection valid.

For, on the 10th of October, 1825, Mr. Attorney General Wirt incidentally and inconsiderately decided that the expression, "the sale of which is authorized by law," in the act of 1815, confined the right of location of New Madrid claimants to lands, the sale whereof *was* authorized by law *at the date of the passage* of that act. *Instr. & Opin.*, 25.

And on the 4th of December, 1826, the same question was presented to him in respect to a pre-emption, when he said, "These lands were not, *at the date of the act*, authorized to be sold; the title being, at that time, in the Quapaw Indians;" . . . but the further limitation is added, "the sale of which *is* authorized by law—that is to say, is now authorized by law. The *is*, he said, cannot be construed to mean *shall have been*; and added, "The act, as it stands, speaks in the present tense; and it would, I think, be rather too bold a construction *to convert the present tense into the future past.*" *Instr. & Opin.*, 28.

Both these opinions, given to the Secretary of Treasury, one in a case from Missouri, and the other in a case from Arkansas, which then was within the District of the Sur-

veyor General of Missouri, undoubtedly were communicated to that office. And, as late as 1851, Mr. Secretary Stuart reiterated the same decision.

There never was a moment, therefore, from the time when Langlois proved his claim, in 1818, until long after 1843, when the survey, made in 1820, the plat and notes of it, certified by the Deputy Surveyor, *could* have been received, without direct disobedience of the decisions of the Law officer of the Government, adopted by the Secretary of the Treasury, as an *official* survey, a *public* survey, or evidence of anything, by the Surveyor General of Missouri, or the Surveyor General of Arkansas; when it could have been in his *official* custody, or he could have held it otherwise than as a private individual; when he had any right to send it to the Recorder of Land Titles, or any Register; when he could have entered it, properly and legally, on his books, or registers, or schedules, or much less have recorded it *in* his books; when the Recorder of Land Titles would have received it at all, much less have recorded it; when, if he had, a copy of the record certified by him would have been evidence in any court, any more than the copy of a record by him of a promissory note given by one private citizen to another, or of a play-bill of a theatre or circus; when any of these officers could have given any *official* certificate of any sort, in regard to the claims, the land, or the location, except that given by the Recorder of Land Titles of the proving and establishment of the claim; when any officer of the Government could have given Hammond and Rector any other or better evidence of their location than the plat and notes certified by James S. Conway; which, under the decisions, had no home, or domicial, or right even of commorancy, or sufferance, anywhere on earth except in the hands, custody, and possession of the claimants, whose sole and exclusive private property and evidence of a fact these decisions adjudged it to be.

The objection and cavils in regard to the whereabouts of the survey, and because it was not sent to the Recorder of Land Titles, and recorded by him, and that the parties slept on their rights, and must be deemed to have abandoned the location, or else it must be concluded that there is something fraudulent in regard to the copies of the survey of 1820 making their appearance for the first time in 1850, are at once dissipated by these simple and conclusive facts.

In 1850 Mr. Rector produces them, and files them in the

Surveyor General's Office. If any other person, any officer, had had them and produced them, he would have had them, not as an officer, but as Rector's private agent, and have produced them as such. The custody of them *could not be* anywhere else than with Rector, in his own hands, or in those of an agent, whose possession and holding was his.

On the 2d of September, 1820, as we have seen, the Commissioner gave the Surveyor General a right to say to claimants that Congress would probably pass a law to legalize their locations, although their surveys, declared to be illegal,, unauthorized, and void, could not longer be regarded as in any sense official, nor the Surveyor General be required to retain them in his charge and custody; although he could, if he chose, and perhaps it was his duty to do it, *refuse* to retain them, and require the parties to take into their own keeping, and relieve him of responsibility for their possible loss or destruction, they were not required to withdraw or abandon their locations, and consequently the evidences of their locations were lawfully kept in their own hands. And the case continued to be the same with Elias Rector, after the act of 1822, removing one objection to the location, had left all the others in full life and vigor, to bar his advance towards a patent. He still had the right to refuse to abandon his location, to hold his plats and notes of survey, as the sinews of his title, and to "wait and see." And there was the more reason to keep these evidences of his right within his own grasp and in his own care, because his brother ceased to be Surveyor General in 1824, as appears by the Commissioner's letter to his successor, of October 20, 1824, found in the volume of Instructions and Opinions, at page 845. He had no right to expect a stranger to take the same care of his private paper (as it was held to be) that a brother had done.

Of the proof of the genuineness of the protocols of Conway's survey, of the transmission to the office at Little Rock of the one deposited in that at St. Louis, and of its remaining in that at Little Rock at least until 1838, we need only say that it is ample and conclusive. Nor is there only this written and oral evidence that the survey was made and returned, but it incontrovertibly appears by the Register of certificates and surveys, an official record, made and kept in the office of the Surveyor General at St. Louis; by the abstract or statement of all New Madrid claims allowed and surveyed, also made out there; by the number of the sur-

vey (2,903) in each of these, agreeing with the protocol, and adopted by the Surveyor in 1828; by the water-marks on the paper of the protocols; and, finally, by the bearing-trees still standing in 1855, and perhaps now, and the marked lines then visible and actually retraced, and in part to be seen to this day.

And we shall show that the protocol, even if unsustained at all points, would be admissible as an ancient document, found in the custody of the party whose rights were secured by it, and where, therefore, the custody of it properly was.

As to the *facts* of the case, there is no possibility of doubt. There is not one as to which any question can be raised. They are absolutely beyond cavil or question.

We pass to the law, which is equally as clear.

ARGUMENT ON THE LAW.

It cannot be contested that Francis Langlois had a right, under the New Madrid act, to locate, in lieu of his land in New Madrid county injured by earthquake, two hundred arpents of other land in the Territory of Missouri; for all the facts necessary to the existence of that right are placed beyond dispute by the action of the Recorder of Land Titles, who invested with the plenary power of investigation and judgment, adjudged in the last resort that the facts were proven, and that the right existed.

That upon so adjudicating, and upon the relinquishment by Langlois to the United States of the land confirmed to him in New Madrid county, the Recorder of Land Titles granted the certificate made by the law conclusive evidence of his right to locate a like quantity of lands elsewhere in the Territory, is proven by the certificate itself.

That, the said claim and certificate being assignable, he sold and conveyed them, by his attorney in fact, to Samuel Hammond, for six hundred and forty dollars, which was paid, is proved by the instrument of cession, by his conveyance subsequently to Story, and by the utter absence, during fifty-two years, of any claim to any interest in the certificate or the land located, on the part of Langlois, any repudiation by him of the act of Story, in making the transfer as his attorney in fact, any denial of the mandate alleged, any reclamation against his action as such attorney in fact,

after the lapse of more than half a century of years, authority from him to Story, in writing, full and plenary, and his assent to the transfer, would be presumed; and the presumption would be equivalent to full proof, even if he had not made the subsequent conveyance.

That Hammond sold one-half or some undivided interest in the claim to Elias Rector, before or in 1820, is certain, by the joint application for the survey, and by the conveyance of himself and his wife; and this and the fact that he afterwards sold or ceded to him his remaining interest, by the total absence of any claim on his part to any interest in the claim, certificate, or lands, for fifty years, and by the fact that he has never been known, nor has any person in his right been known, during half a century, to unite in any effort for the confirmation of the location, to expend money, or employ counsel in regard thereto, or to be heard of in any way in connection therewith. As to Story, he formally conveyed his interest to Hammond and Rector, in 1821, to perfect title.

Story had possession of the certificate, and assigned to Hammond. Hammond and Rector jointly applied for the survey. Rector afterwards had the certificate, and at his death it came to his son: and he and his son have for fifty years asserted the claim. This has been as clear a *possession* of the claim, as to exercise exclusive control over land in possession. And everything will be presumed in favour of this possession necessary to maintain its legality.

In favour of long possession, everything that has been done shall be presumed to have been rightfully done; and though it do not appear to have been done, the law will presume that whatever was necessary has been done.—*Strother* v. *Lucas*, 12 *Peters*, 411.

The assignment of a military warrant, under which a claim has been asserted for many years, may be presumed to be genuine, and for a valuable consideration.—*Lewis* v. *Baird*, 3 *McLean*, 57.

After a long possession in severalty, a deed of partition may be presumed.—*Hepburn* v. *Auld*, 5 *Cranch*, 262.

In *Strother* v. *Lucas*, 12 *Peters*, 452, the Court said: "After this lapse of time the legal presumption of the validity of both deeds would attach, by the maxim, that, in favor of long possession and ancient appropriation, everything that was done shall be presumed to have been rightfully done;

and though it does not appear to have been done, the law will presume that whatever was necessary has been done."

And the same case settles that Hammond and Langlois and Story and all persons claiming under them have slept on their claims, if they had any remaining, so long, that they are to be deemed to have abandoned them, and that the title of Rector is to be deemed rightful under valid sales and cessions. It is too late now to impeach these.

See also *Mitchel* v. *The United States*, where this presumption in favour of an ancient appropriation was applied against the Government. Anything that will make such an appropriation good will be presumed; if it *could* have had a lawful foundation: *for whatever may commence by grant is good by prescription.* So a long possession of Indian lands warrants the presumption that it was founded on an Indian deed duly confirmed, or on a license or grant from the Government. There is prescription by lapse of nearly fifty years against Hammond, and assertion of exclusive title even in Henry M. Rector, the son and heir, for nearly thirty-five years. A conveyance by Hammond will be presumed.

See also *Stoddard* v. *Chambers*, 2 *Howard*, 316, where, forty years having elapsed since a deed purported to have been executed, and a claim under it having been continually asserted, the Court held that regular proof of it might well be dispensed with.

The Act of 26 April, 1822, to perfect New Madrid locations, recognizes the right to assign the certificates granted to the claimants, by the phrase, "the holders and locators of such warrants."

The Act of 1843 did the same by giving "the owners of the warrants" the right to enter lands in lieu of those located that had been sold.

The certificate of the Recorder of Land Titles, in this case, authorizes Francis Langlois, or his legal representatives to enter the 200 arpents of land.

On the 3d of July, 1828, the Commissioner of the General Land Office wrote to the Register at New Orleans, that in his opinion persons who had purchased from pre-emptioners might be considered their legal representatives. And in 1816 the Attorney General decided that a purchaser at Sheriff's sale was entitled to the patent.—*Instr. & Opin.*, 740, 5.

In *Galt* v. *Galloway*, 4 *Peters*, 339, the Court said: "The possession of the warrant by Westfall is the only evidence

of his right to make the locations; and this has uniformly been considered at the Land Office as sufficient authority. Letters of attorney were seldom if ever given to locators, because they were deemed unnecessary. The entry could only be made in the name of the person to whom the warrant was issued or assigned, so that the locator could acquire no title in his own name, except by a regular assignment."

Entries by assignees were always sanctioned and allowed. So it was in in cases of pre-emption. See Letter of the Commissioner, *Instr. & Opin.*, 395. Opinions of Atto. Gen. Rush, Id., 2, 3. Opinion of Atto. Gen. Butler, Id., 83.

See also Letter of the Commissioner, October 15, 1829, to the Register and Receiver at St. Helena, and 17 May, 1830, to the same officer—*Instr. & Opin.*, 740, 741.

Lessee of French & wife v. *Spencer*, 21 *Howard*, 226, was the case of an assignment, by Power of Attorney, of a warrant authorizing the location of three hundred and twenty acres of bounty land. The instrument was precisely like that given by Langlois to Story. It contained a power to locate, and conveyed the land that might be located. The Court held it valid; and that the patent *related* back to the date of the entry, so as to inure to the benefit of an intermediate *bona fide* alienee.

It is proven that application for the survey was made by Hammond and Rector, assignees of Langlois, on the 17th of January, 1819, with sufficient certainty of designation of the lands fixed upon by the claimant; and this application was made, as it should have been, to the Surveyor General of Illinois and Missouri.

It is proven that the order of survey was given by the Surveyor General; but if it were not proven, it would be presumed. The survey was made by a deputy surveyor; and the presumption is that it would not have been made without an order. *Omnia ute præsumuntur octa, omet probetur in contrarium:* and proof that that survey was not made without an order, if one was necessary, cannot be required after the lapse of fifty years.

A survey is made by a surveyor under oath, and is evidence as to all things that are properly within the line of his duty. It is evidence, because officially done under oath in the discharge of his duties to the Government and the public.—*Elliott* v. *Pearl*, 10 *Peters*, 441.

In *Russel* v. *Transylvania University*, 1 *Wheat.*, 432, the Court said: "By the land laws of Virginia, the return of

the surveyor into the office is the only legal identification of the land on which the right of the individual attaches."

In *Craig* v. *Bradford*, 3 *Wheat.*, 594, under a warrant of the Governor of Virginia, a thousand acres of land were surveyed by a deputy surveyor, who never returned the surveys to the office of the principal surveyor of the county, (being killed by the Indians,) but one of the company took possession of the few notes after his death, and lodged them in the office. It did not appear that the Deputy Surveyor had in his possession a warrant authorizing him to execute the survey; and all the lines were not run.

The Court decided that the certificate of the surveyor, stating that the survey was made by virtue of the warrant, was sufficient evidence that the warrant was in his possession. and the warrant was held to be described in the certificate with sufficient certainty to prove that the surveyor acted under its authority.

Also, the Court held that the failure of the surveyor to run all the lines on the ground, or to see it plainly bounded by natural bounds or marked trees, or to observe other *directory* provisions of the law, could not invalidate the survey, because the party had no power to control the conduct of the surveyor, and the neglect of that officer to perform his duty could not deprive the party of his title.

And, also, the Court held that the survey, though in fact made by a Deputy Surveyor, was in point of law to be considered as made by the principal, and consequently his signature to the plat and certificate was a sufficient authentication of the survey to entitle the party to a grant.

In *Taylor and Quarles* v. *Brown*, 5 *Cranch*, 234, (also a case from Kentucky,) the Court held that it was not necessary that the warrant should have been in the hands of the surveyor; that it was sufficient authority for him to survey the land, if he knew that such a warrant existed; and if it had been necessary, the presumption arising from his making the survey was strong that he had it, and sufficient proof until the contrary should be shown.

The survey was made by a Deputy Surveyor, and he being killed, and his papers preserved by his attendants and delivered to the principal surveyor, the latter made out the plat.

The Court held the title valid; and said, also, that the surveyor's failure to *record* the survey could not invalidate

it. Every surveyor was required to return a list of his surveys to the College of William and Mary. The Court said that it could not be contended that the surveys were void if the list was not returned. Several other things were by the law required to be done by him; and the Court said that his neglect to do them could not vacate his surveys.

The survey, the Court said, *is the appropriation.* The land was actually marked and bounded, and the marks and bounds were a matter of public notoriety. That was notice enough to all other persons.

And the Court thus stated the general doctrine as to the presumption of performance of official acts: "The act of recording was a *duty* which the officer was bound to perform. The complainants could not compel him to perform it, and therefore they ought not to suffer, if he neglected it."

In that case there was a grant; and the Court said that after a lapse of thirty years all the necessary prerequisites were to be presumed.

In the present case, the statute of 1815 expressly makes it the *duty* of the surveyor to return the plat and a notice to the Recorder. He was forbidden, by higher authority, to do so, or even to return the survey. Rector and Hammond could not *compel* him to do either. Therefore they could not suffer by his failure to do either.

"Everything done by a Deputy Surveyor," the Court said, "is supposed in law to be done by the principal. * * If the deputy acts, it is in the name of the principal. For making out a plat and certificate from the fieldwork is a mere mechanichal operation. It may as well be done by another as by the officer who actually ran the lines."

The Court held the *survey* an appropriation of the land. It was no longer waste, vacant, or unappropreated land. And they said: "Lapse of time cannot *enfeeble* a claim; it either destroys it altogether, or it has no effect."

In *Lessee of Harris* v. *Buchon et al.*, 1 *Wash., C. C. R.*, 191, it was held that a survey made and returned, and having every appearance of regularity, must be taken as, and is presumed to be regular, until the contrary is shown. It would be very mischievous, the Court said, if a man, having a paper title, apparently regular, should be compelled, in asserting his title, to prove that the public officers performed their duty. It would be substituting a title dependent upon the uncertain tenure of men's memories for a written one.

In *Griffith* v. *Bradshaw*, 4 *Wash., C. C. R.*, 171, the original survey and plat were produced, and the retracing of the lines proved. The Court said, "That the surveyor, a public officer, acting under the sanction of his oath, has made the survey in a legal manner, is to be taken as a fact, unless the contrary be proven; and the burthen of this proof lies upon the party who questions the legality of the survey. * * It may become necessary to produce the original survey, and frequently to have the lines retraced; but if, in this examination, the identity of the land is established, either by its own marks or those of adjoining tracts, it is sufficient."

In the present case the original survey is produced, and the lines have been retraced. There is no doubt that the survey was *made*, and made by a regular, competent, sworn Deputy Surveyor.

It has been objected that the protocols now offered in evidence and so amply proven, were found, in 1850, in the possession of Rector himself; and the fact that he had not before relied on the alleged survey of 1820 has been in divers ways commented upon. We have sufficiently explained that by the simple and undeniable facts of the case, and as to his possession of the protocols, except that originally deposited in the office of the Surveyor General at St. Louis, they were exactly where they should have been, and where reasonably and naturally it was to be expected they would be. He had possession of the muniments and sinews of his own title.

Speaking of ancient documents, purporting to constitute part of the transactions themselves, Greenleaf says, i *Ev.*, § 142, that care is to be taken, in the first place, to ascertain their *genuineness;* "and this may be shown, *prima facie*, by proof that the document comes from the proper custody, or by otherwise accounting for it. Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are in precisely the custody which gives authenticity to documents found within it."

In *Bishop of Meath* v. *Marquess of Winchester*, 3 *Bing. New Cos.*, where the House of Lords requested the opinion of the Twelve Judges, a case, purporting to be a case stated for the opinion of counsel by a former bishop, had been found among his papers after his death, and the question was, whether it was admissible in evidence. TINDAL, Ch.

J., said that the papers were found in a place in which and under the care of persons with whom papers of the late bishops might naturally and reasonably be expected to be found: and, he said, "that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper places of deposit. If documents continue in such custody, there never would be any question as to their authenticity; but it is where documents are found in *other* than the proper place of deposit, that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and proper, though differing in degree; some being more so, some less; and in those cases, the proposition to be determined is, whether the *actual* custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases."

Old grants to abbeys, he said, had been *rejected*, as evidence of private rights, where the possession of them appeared altogether unconnected with the persons who had any interest in the estate, * * where the possession of the documents *was unconnected with the interests in the property.*

An old charterlary was held admissible, of a dissolved abbey, *because found in the possession of the owner of part of the abbey lands*, though not of the principal proprietor. The proper custody would have been the Augmentation Office; but the Court said the place of custody was where it might be reasonably expected to be found.

So he held the case admissible, because, though relating to the affairs of the See, it also related to the private interests of the bishop, and might reasonably and naturally have been expected, even as relating to the See, found at the mansion house.

In *Neale* v. *Samples*, 8 *Ad. & El.*, 151, it was held that a document more than thirty years of age was admissible in evidence without proof of execution, if produced by persons whose possession of it might be reasonably accounted

for, *although their custody was not the strictly proper one.* The document there was a deed of settlement executed by defendant's father, and found among the papers of the father. It was put in as proving itself, and objected to as not coming from the proper custody. The counsel objecting insisted that *it ought to have come from the custody of the party claiming under it*, not that of the party against whom its provisions operated. And he quoted from Viner, "It is hard to prove ancient things, and the finding them in such a place [among deeds and evidences of land,] is a presumption they were honestly and fairly obtained, and preserved for use, and are free from suspicion of dishonesty."

All the judges held that, though not the strictly proper custody, it was enough if it was one that might be reasonably and naturally explained, *though not that of the persons strictly entitled to the possession.*

In one case, the protocols *were* in possession of the party strictly entitled to their possession; and were entitled to be read without any proof whatever.

But we need not ask that. The proof is ample that the survey asked for was made by James S. Conway, Deputy Surveyor, and that the lines were duly and legibly marked, and the plat and notes of the survey made out by him in triplicate, certified on the 16th of July, 1820; and that, of the three originals, one was deposited in the Surveyor General's Office at St. Louis, was transmitted thence in 1832 or 1833 to the office at Little Rock, and there remained until at least 1838; and the others were delivered to Hammond and Rector: that these were preserved, retained by Elias Rector until his death, came afterwards to the possession of his son, and were by him filed in the Surveyor General's Office at Little Rock, on the 18th of June, 1850, and one of them withdrawn by him on the 12th of September, 1850, and transmitted to the General Land Office.

And it is proven beyond any dispute, that, under the instructions and decisions of the General Land Office, the Attorney General, and the Secretary of the Treasury, in force and enforced from the 16th day of July to the present day, the plat and notes of survey returned in 1820 could not be recognized and approved by the Surveyor General as regular, valid, or authorized; could not be recorded in his office; could not even be filed there as an official paper; could not be transmitted by him to the Recorder of Land Titles; could not, if they had been transmitted, have been recorded by the

Recorder of Land Titles; nor any certificate granted by him thereon, nor by the Surveyor General, to entitle the claimant to a patent.

As we shall see, hereafter, the Supreme Court of the United States has decided that the *application* for a survey was not a location; but the land was not appropriated until the survey had been made, and returned to the Recorder of Land Titles. We shall consider these doctrines hereafter.

The statute itself defines what the location is. It is the survey. The rest is directory to the officers, of what they are to do *after* the location.

And it is quite evident that when the claimant had designated with sufficient certainty the land which he proposed to take, and had formally applied to have it surveyed, he had done all that he was required to do. Certainly, if notwithstanding no survey were made, what he had done would not avail him, because, without a survey, the land selected was not severed from the public domain; but when the survey had been made, that was done; and if the surveyor had made out and certified a plat and field notes of the survey, after surveying the land and marking the bounds, limits and corners, and had delivered a duplicate to the claimant, and the duplicate retained by him had been lost by him, or destroyed, or he had even been killed while on his return to St. Louis, and the duplicate in his possession destroyed, the claimant would not lave lost the land, but it would have been sufficient for him to file in the Surveyor General's Office the duplicate delivered to himself; and his title would have been complete.

For no one can lose a perfected right, by the loss or destruction of the evidence of it.

We might argue that if the Surveyor General neglected or failed to record the survey of 1820, or to forward it, with the required notice, to the Recorder of Land Titles, and to the General Land Office; or if the Recorder of Land Titles failed to record it, when it was the duty of either to do either act, the claimants, who had done all that they were required to or could do, who has applied for the survey, designated the lands selected, with sufficient certainty and identification, and had the survey made, and returned to the office of the Surveyor General, duly certified, could not be injured or prejudiced by such failure or neglect: and the authorities on that point would be conclusive.

But we do not pretend to charge that there was any such

failure or neglect. On the contrary, the Surveyor General was prohibited from doing any of those acts. He did not *fail* or *neglect* to do them: but he was prevented by the orders of his superiors; and the same principle applies, that, when a party does all that is in his power, and is prevented by the act of the Government or its agents from doing the further acts that the law required, his failure to do them cannot deprive him of his right, or in any way prejudice him. The United States cannot avail itself, to defeat a claim, of the omission to do acts which its own officers, either by fraud, or error, or ignorance, prevented. As to all such matters, certain principles are perfectly well established.

The Supreme Court of the United States said, in *Lytle and others* v. *The State of Arkansas:*

"It is a well established principle, that where an individual, in the prosecution of a right, does every thing which the law requires *him* to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." There the party had proved his pre-emption and offered to pay the price of the land, and the Court said, "Nothing more could be *done* by him, and nothing more could be required of him, under the act." See, also, *Taylor & Quarles* v. *Brown*, 5 *Cranch*, 241.

All that Hammond and Rector *could* do, and all that they were required to do, was, to apply for the survey of the land selected by them, indicating with sufficient clearness and certainty the locality and bounds of the tract they desired to place their claim upon. They did that. They were not bound to go to the district of Arkansas and accompany the surveyor. After the application, everything devolved upon the officers of the Government, and their neglect could not destroy the parties' rights.

The Commissioner of the General Land Office laid down the same principle on the 19th of July, 1836, in regard to pre-emptions; that when an individual was entitled to one, and did, as far as he was able, all he was required to do under the law, and was prevented, *by any circumstances on the part of the Government*, from completing his entry within the time prescribed by law, it was an invariable principle to admit his claim.—*Instructions and Opinions.*

And the same sound and just principle is applied in *Craig* v. *Bradford*, 3 *Wheaton*, 494: *Stringer* v. *Lessee of Young*, 3 *Peters*, 338: *Casteller's Case*, 2 *Black*, 97: 1 *Black*, 602.

2d. If it continued, in 1820, to be required of the Surveyor General that he should report and transmit plat of survey to the Recorder of Land Titles, it will be presumed that he did so. The maxim, *Omnia rite acta præsumuntur, donec probetur in contrarium*, applies to all public officers, in favour of those who have rights dependent upon those officers having done their duty. No just Government will deny the right of a citizen, in consequence of the neglect of its own officers, or of the loss of papers which the party could not prevent, having over such papers no control.

See, as to this presumption, *Griffith* v. *Bradshaw*, 2 *Wash., c. c.*, 172: *Taylor* v. *Brown*, *Wilcox* v. *Jackson*, 13 *Peters*, 511: *Polk's Lessee* v. *Wendell*,

The Act of April 29, 1816, required the Surveyor General to perform *all* the duties required by law to be performed by the Principal Deputy Surveyor, and specially directed that he should transmit to the Registers of the Land Office, general and particular plats *of all the lands surveyed or to be surveyed*, and forward copies to the General Land Office; and *all* plats, of surveys, &c., pertaining to *any* office theretofore established or authorized, for the purpose of executing or *recording* surveys of lands within the Territories of Illinois and Missouri, were to be delivered to such Surveyor General. All provisions of former laws repugnant to or inconsistent with these were repealed. 3 *Stat.*, 326.

And the Act of 15th June, 1832, creating the office of Surveyor of the Territory of Arkansas, required the Surveyor for Missouri and Illinois to deliver to the new officer all the maps, papers, records and documents *relating to the public lands and private land claims* in the Territory of Arkansas. There is no provision, nor ever was any, regulating any other office or officer to furnish such surveys. 4 *Stat.*, 531.

Which shows that, in conformity to the Act of 1816, all the surveys of private land claims of every kind were kept in the office of Surveyor General for Illinois and Missouri. And if, after the passage of the Act of 1816, it continued to be necessary, under the New Madrid Act of 1815, for all surveys to be filed and recorded in the Surveyor General's office, that certainly made the return of the survey there a location. The Act of 1815 itself defined the meaning of the word location, by the words, "the *location* made, on the application of the claimants, *by the Principal Deputy Surveyor for said Territory*, whose *duty* it shall be to cause a survey

thereof to be made, and to return a plat *of each location made*, together with a notice," &c. If there is any virtue in language, and if words could be used that would make it so, the survey was the location. It severed the land from the public domain. The plat was but evidence of it. If anything more was necessary, the law does not say so. The plat is a plat *of the location*. Of course it was made out after the location had been effected; and if anything more *was* necessary, it could have been nothing more than the making and filing of the plat. A levy is made when the officer takes the property, though his return on the writ may be the only sufficient evidence of it. In that sense it may be admitted that making the plat and notes and filing them in the office of the Surveyor General were necessary to constitute a complete location, because until then and without that there would be no competent official evidence of the survey.

In *Bagnell* v. *Broderick*, 13 *Peters*, 436, the Court said: "The notice of location made by the claimant with the Surveyor General is no part of the evidence on which the General Land Office acted; but the patent issued on the plat and certificate of the Surveyor, returned to the Recorder's office, and which was by him reported to the General Land Office. The United States never deemed the land appropriated *until the survey was returned*, for the reason that there were many titles and claims, perfect and incipient, emanating from the Provisional Government of France and Spain, and others from the United States, in the Land District where the New Madrid claims were subject to be located. So there were lead mines and salt springs excluded from entry. Then again, the notice of entry might be in a form inconsistent with the laws of the United States; in all which cases no survey could be made in conformity to it.

If no such objection existed, it was the duty of the Surveyor to conform to the election made by the claimant having the location certificate from the Recorder. Still, the only *evidence* of the location recognized by the Government as an appropriation was *the plat and certificate of the Surveyor*. Such is the information obtained from the General Land Office. The *location* referred to in the Act is the plat and certificate of survey returned to the Recorder of Land Titles; because, by the laws of the United States, this is deemed the first appropriation of the land."

The "survey" was returned to the Surveyor General's

Office. Of course the location was not deemed complete until then, because the plat and field notes so returned were the only *official* evidence of the survey, which was itself the location.

And the reasons given by the Court apply to *this* return, and not any report or notice to the Recorder of Land Titles. *All* the surveys of *all* claims were in the office of the Surveyor General. There were *none* left in the office of the Recorder. It was the Surveyor General who could tell whether a private claim was interfered with by the location. The Recorder could not. The Surveyor General could tell whether a lead mine or salt spring was interfered with. The Recorder could not. No plats, even, of the *Public* Surveys were in the Recorder's Office. He never had any except the plats of private surveys, or rather of *particular* ones. The Surveyor General was the officer, and the only one, authorized to determine whether the *notice* was in a form consistent with the laws of the United States, and whether, therefore, a survey could or could not be made in conformity to it.

In that case the Court expressly said that the plat and the certificate of the Surveyor were the only "*evidence of the location* recognized by the Government; and that was true, in this sense, that it was only by means of them that the Recorder's patent certificate could be obtained. But it was not true that these WERE, as the Court in the next breath said, the location. Being *it*, and being the *evidence* of it, are two very distinct things. The return of a Sheriff is *evidence* of service, the *only* evidence that suffices; but the return IS not the service.

If the Surveyor General had *refused*, in any case, to send up to the Recorder the plat and notice, when a regular survey had been made, or had died without doing it, or had sent them and they were lost or destroyed on the way, would there have been no location? If he had refused, he could have been compelled to send up the *evidence* of location. If so compelled, would he, in obeying, have made the location?

The truth is, that the language of the opinion is wanting in accuracy, because the views of the writer of the opinion were not clear and precise. Unfortunately there is by far too little careful weighing of words in our modern judicial disquisitions and commentaries; so that that which is the very first requisite of a good judicial determination is

hardly thought of at all. We may well lament the want of that accuracy and precision, of that almost mathematical exactitude of word and phrase, which so eminently characterized the old Roman and the old English jurists, and today belongs to the French authors and books of the law; for that want is the continual and teeming source of bad law, false judgment and judicial wrong-doing.

The Court departed from no principle when it said that the plat and notice required by the Act of 1815 were the only legitimate *evidence* of the location: but it was all at sea when it immediately declared this evidence of a fact to be the fact itself. It was not only illogical, and contrary to simple common sense, but it was beyond the possibility of things that the evidence of something done could be itself the thing that had been done. And it was, moreover, a wide and fatal departure from well settled principles and established doctrine, founded on the solid bases of justice and sound reason; as we propose to show.

In *Stoddard* v. *Chambers*, 2 *Howard*, 284, the plaintiff claimed under a Spanish concession, made in 1800, and the defendant under a New Madrid claim, *entered* in October, 1816. The land on which the location was made, was not surveyed at the time. It was surveyed in 1817, 1818, and 1819, and was not offered at public sale by order of the President, until 1823. The case was decided in 1844.

In March, 1818, it is stated, the certificate issued in favor of Peltler was surveyed by Brown, the Deputy Surveyor, and the location made.

In the same case, an *entry* was made in May, 1818, and a New Madrid certificate, which was surveyed in July, 1818.

Peltler obtained a patent in 1832; and in 1836 the concession to Stoddard was confirmed.

One of the objections to the New Madrid location was, that the land was not surveyed, when it was made, and therefore the sale of it was not authorized by law; and another that it was reserved from sale, as covered by a Spanish grant.

The question was whether the New Madrid location had been made "in conformity to law." The *location* of Peltler, the court said, was made in 1816, and his survey in 1818; and there was no question that at both of these times the land was reserved from sale, and the sale of it was not authorized by law. It was reserved from sale by the act of 1811, because covered by an unconfirmed Spanish claim. But for

that, the madrid location would have been held valid; but as it was, the case decided nothing in regard to the questions here.

In *Barry* v. *Gamble*, 3 *Howard* 32, the Court said, of the survey, "*Its* return by the Surveyor, with a notice of location to the Recorder, was the first appropriation of the land; and not the notice *to* the Surveyor General requesting the survey to be made." It was certainly true to say, that not this *notice* or application, but a *survey* actually made in pursuance of it, was the location; in a case, at least, where the application not being for subdivisions by the further surveys, *required* a special survey. But it was certainly a departure from well-established doctrine to say that a *return* of this survey, not to the officer of last resort in respect of the regularity and sufficiency of all surveys, but to one who had nothing to do with surveys, was "the first appropriation" of the land. It was to violate *two* well settled principles: 1st, that the actual survey and the return of it to the officer who is to approve and accept it, is the location; and second, that when the survey has actually been made, the failure by neglect or accident of the officer to record or return it *cannot* prevent the party from having title.

See *Lessieur* v. *Price*, 12 *Howard*, 60, the New Madrid certificate issued on the 20th November, 1817, to Baptiste Delisle, and application or notice of location was made on the 2d of June, 1821, specifying particular subdivisions of the public lands according to the surveys.

A survey was made by the Deputy Surveyor, dated 5th August, 1811, and filed 11th February, 1822, on which a patent certificate issued.

After the application was filed, and before the survey was *made*, the lands were selected by the State of Missouri under a grant by act of Congress.

The Court declared that the notice of location was the mere act of the party; that as the act of 1815 provided that, where a location should be made, the title to the land injured should revert to and vest in the United States, a *concurrent* vestiture of title must have occurred; the injured land must have vested in the United States *at the same time that title was taken by the new location.*

But, in point of fact, the Recorder of Land Titles took the relinquishment before granting the first certificate; and he was right, because the certificate gave the right to locate, and was assignable; and the party could have no right to

retain the title to the injured land and hold this right to locate at the same time.

But the Court said that the transaction was intended to be an *exchange* between the parties and the Government. *When* did the United States take title?

Now, the truth is, that no *exchange* was intended; no *conveyance* to the United States was provided for or thought of. The act provided that, upon the location being made, the title to the injured land should *revert* to and *become absolutely vested* in the United States—that is, should become so by operation of law.

The Recorder thought it best to take relinquishments. He may have been instructed to do so; but the *law* provided for none, nor gave the matter any of the requisites of an exchange.

The Court said that the plat and certificate were returned to the Recorder's Office and there recorded, and in that office the law required all the official business to be transacted, and not in the surveyor's office. It was true, they said, that the notice of location, and plat and certificate were recorded in the surveyor's office; but not to furnish evidence to the claimant, but to have evidence there to show that the land was appropriated according to the New Madrid act, and for the convenience of the Surveyor's Department. That, the Court said, was the plain meaning of the law, and its import could not be changed by the practice pursued in the surveyor's office; there the claimant could not go for record evidence of his location, bound by the United States to an exchange of lands. His entry was to be made by the Principal Surveyor, or under his direction. It was to consist of a plat of survey and a certificate describing the land, with the name of the claimant for whom the location by survey was made. *This return the Recorder had to examine, pass upon*, and record. If the location and *survey* had been *properly made*, then the United States assented to the exchange, and not until then.

That is merely imaginary. *The law did not require the Recorder to examine*, or *pass upon*, or *record* the returns, and he accordingly never did either. The location was complete as soon as the survey was made and returned to the surveyor's office; and upon that the injured land reverted. The Court itself, in the very next paragraph, after stating the evils attendant on allowing parties themselves to locate warrants, expressly says, "and, therefore, the act of 1815

vested the power of *locating* the claim in the Principal Surveyor of the Territory." And the Court might and should have added, "and gave the Recorder no control or power of revision or of annulling the location so made."

As to the *relinquishment*, the opinion of Justice McLean, in *Bagnell* v. *Broderick*, shows that it was exacted as a condition precedent to granting the very first certificate—that of *right* to location.

The language of the act was, "that in every case where such location *shall be made*, according to the provisions of this act, the title of the person or persons to the land injured as aforesaid, *shall revert to* and *become absolutely vested* in the United States." If that does not mean that it shall *revert* and *become* vested, by operation of law, and without any act of the party, upon and as a consequence of the location, it is useless to endeavor to express anything by the use of legal language. The word revert means to *return to*, to go *back* to. Is a *reversion* effected by a *conveyance?* Is it the exact meaning of "shall *become* vested," that it shall be so without the necessity of any act of the party? *Somebody*, in his superior wisdom, thought that Congress was not aware that it could not, by enacting it, make land revert to and become vested in the United States, and to remedy the supposed blunder, required *deeds* of relinquishment, which the law certainly did *not* require. The truth is, that the law was perfectly right. Congress, or the legislator from Missouri, who drafted the law, knew what he was about better than the gentlemen who undertook to make up for his short comings. All the land injured in New Madrid county, to which there was any individual right, was held by virtue of Spanish and French claims, and not patented; and the provision in question was sufficient to *retain* the title in the United States. There was no need of a *relinquishment.* There can be no *re*-conveyance when there has been no conveyance.

All that the *law* directed or *authorized* the Recorder to do, on receiving the plat and notice, was, to cause it to be recorded in his office and to receive his fee; to furnish *a* report of claims allowed and locations made to the General Land Office; and either to deliver to the party *two* certificates in succession, the first *stating* that he was entitled to a patent, and the other entitling him to it in fact, (all which is too ridiculous to have been the intention,) or to issue the last-mentioned one when one furnished by some *other* officer

should be filed with him. That *other* officer was the Surveyor General; and *he* was to state the circumstances of the case, and that the party was entitled to a patent before, or at the time of, sending up the plat and notice. As to *examining* and *passing upon* the *return* or the *survey*, there is not a word in the law; and the *survey* never went to him so that he *could* examine *it* and pass upon it, to see if it has been "properly made."

Moreover, the recording of the survey in the office of the Surveyor General was not a matter of *practice*. It was *required* by the act of 1816; and no other officer could certify a copy of *any* survey.

In *Hale* v. *Gaines and others*, 22 *Howard*, 144, the Court said that the Surveyor General disregarded the application for a survey originally made, and so the claim stood from 1818 to 1838. The fact of the survey of 1820 did not appear in the case.

The Counsel urged that there was not location until the plat and notice reached the Recorder, and discanted on the necessity of a re-conveyance by him to the United States of the injured land AFTER THAT, down to which period, they said, and until the exchange of land took place, the claimant was not bound, but might abandon his proposed location, or change it for another, or sell his float, or elect to keep his injured land. The Court listened to this nonsense, and again asserted that there was no location until the plat and notice were received and *approved* by the Recorder, thus making his *approval* necessary to the location.

What the Court listened to *was* nonsense; for, if the *survey* was the location, then, the moment it was made, the land reverted to the United States by operation of law.

The Court, in this case, (*Hale* v. *Gaines*,) having only the survey of 1838 before it, as an *original* location, held that it was invalid, because of the reservation in 1832, and of its disobeying the act of 1822, in not conforming to the sectional lines required by that act in all *future* locations; and that act of 1834 did not remedy *these* defects.

All that would be true, if the survey had been made for the purpose of *locating* the claim. As it was not, it is foreign to the case.

In *Rector* v. *Ashley*, 6 *Wallace*, 142, the Court again ruled that the return of the survey to the office of the Recorder was essential to the appropriation of the land; that the party acquired no vested interest in the land until the sur-

vey had been made, and that survey had been filed in the office of the Recorder, and *approved* by him.

Nothing in the record showed when the survey, dated May 30, 1838, was returned to the office of the Surveyor General. It is only said that it was certified on the 16th of June, 1838, to be *then on file* in the office of the Recorder of Land Titles. Nor did it appear whether there had been a survey, at the time—that is, in 1820, under the application of 1820. But it is very certain that the case was far from showing that the *location* of the New Madrid claim of Cockerham was not prior to that of Ashley, even if made in 1838.

In this case, the survey never was reported to the Recorder. We contend—

1st. That there was a complete location without that, notwithstanding these decisions; and

2d. That, if these decisions are correct, this return and report was illegally and unlawfully and in clear violation of our rights, *prevented* by the authority of the United States.

The first can hardly be considered a question of *law;* for the Supreme Court based its conclusions in regard to it altogether upon what it supposed the *facts* to be, as to the *mode* of making and completing such locations, and the practice of the General Land Office.

It never was true, either in point of fact or practice, at least, that not only a survey and a return of it to the office of the Surveyor General, but *also* a return of that survey by the Surveyor General to the Recorder of Land Titles, was necessary to constitute a location of a New Madrid claim.

The act of 1815 did not require the *survey* to be returned to the Recorder or transmitted to him by the Surveyor General. The *location* was to be made by *him*, by causing the survey to be made; and it was made his *duty*, AFTER THE LOCATION, to return "*a plat of each location made*" to the Recorder, with a *notice* in writing, designating the tract that *had* thus *been located.* That is the language of the act, and it is not possible to mistake its meaning or pervert it.

It is not possible, perhaps, to determine with certainty what the *third* section of the act of 1815 meant. As it reads, it required the Recorder of Land Titles to issue two certificates in succession, the second, upon the first being filed with him, to the claimant, each certifying his right to a patent. We think that the only sensible construction is, that the Surveyor General was to issue the first certificate, so that

the party might at once have conclusive evidence of his location being complete, and of his right to a patent. And we find the Commissioner of the General Land Office approving the determination of the Surveyor General, in 1820, not to grant certificates, in certain cases, on which the parties might obtain patents.

We do not say that the *application* for a survey was a location, within the meaning of the law, where a survey was necessary to sever the land selected from the public domain. Such an application, not followed by a survey, would have been ineffectual to identify the land or carve it out of the public domain. But, when the survey was *actually* made on the ground, the lines run and marked, the corners established by posts and made certain by bearings from natural objects, and the plat was made out and the field-notes appended, and the whole signed by the Deputy Surveyor, and returned into and filed in the office of the Surveyor General, the survey was complete, and the location was therefore complete; and all that had been done had relation, in equity, to the date of the application.

No time was prescribed, within which the Surveyor General was to return the plat and survey to the Recorder. The party had a right to his certificate at once—to be given by the surveyor, and to show that the location had been made—and he was, *therefore*, entitled to his patent-certificate. This was *his* muniment of title; and to put the Recorder officially in possession of the evidence of the location, he was required, within some reasonable time, of course, to forward to him a copy of the plat and a notice designating the tract.

When a quarter, half, or whole section, according to the lines of the *public* surveys, was selected, it was only necessary to send a plat of that portion of the public survey. There the location was complete as soon as the application was made. The Recorder had nothing to do with the public surveys. How could he have anything more to act on, with regard to a *completed* particular survey?

As soon as the survey was returned to the Surveyor General's office, he could give and certify copies of it, to be evidence in all courts. Hammond and Rector could have demanded that, but for the instructions from the General Land Office, which prevented the recognition and recording of the survey, *if the Surveyor General had never sent a plat and notice to the Recorder of Land Titles.*

The act of 29th April, 1816, which required the originals

of *all* surveys to be retained and recorded in the Surveyor General's office, and authorized him alone to certify copies, did not permit him to send even the original *plats* to the Recorder of Land Titles; but only a copy, with a notice from himself, showing what was done and completed, and with which the Recorder had no concern. For him, the survey, approved and recorded by the Surveyor General, was final. He had no power of revision. That was both the *law* and the practice.

The act of 1815 *defines* the meaning of the *location* of a New Madrid claim. No construction can change it. To do that is to *make* law. It was the application for and obtaining a survey. As soon as the survey was made and returned to the office of the principal Deputy, or, after the change in that respect, of the Surveyor General, all that the *party* had to do was done. The rest were duties of officers of the Government. The act of 1815 expressly makes them so, requiring the principal Deputy Surveyor to forward copy of the plat, with a report, to the Recorder of Land Titles, or, at a later date, to the proper Register; and requiring the Recorder of Land Titles to record these and grant a certificate. The act *intended*, we believe, to direct the principal Deputy Surveyor to give the party a certificate, as evidence of his title, to be in his own possesssion and avail him even if the survey should be lost or destroyed; upon filing which with the Recorder of Land Titles he could obtain his certificate, upon which a patent would issue.

The return required to be made by the Principal Deputy to the Recorder was but the *evidence* of the location. If lost *in transitu* and its loss unknown, so that it was never recorded, the location would have been none the less *made* and *complete;* and it could unquestionably have been proven at any time afterward, even by an unofficial copy, or by the Surveyor's marks upon the land and oral evidence.

When the Supreme Court said that the Government never considered the location complete until the survey was returned to the Recorder of Land Titles, it simply erred in a matter of fact, and did not decide a point of law.

It is easy to show that the *fact* was not as stated. Mr. Justice Catron said that such was the information obtained from the General Land Office. The information was incorrect, or he misunderstood it.

The act of April 29, 1816, changed the law in regard to surveys, and after its passage locations of New Madrid claims

were complete upon the return of the survey to the Surveyor General's Office; for there the whole work of surveying was ended.

This act of 1816, which the Supreme Court failed to notice, repeals everything before enacted repugnant to or inconsistent with its provisions. The act of 1815 required New Madrid surveys to be recorded in the Recorder's office. The act of 1816 required the Surveyor to record them in *his* office. The act of 1815 in this, was repugnant to, and inconsistent with, that of 1816. So much of the former, then, was by the latter *repealed.* So, also, the act of 1815, required the Surveyor to return a "notice and plat" to the Recorder; but the act of 1816 directed him to make out *general* and *particular* plats of all lands surveyed, and send them to the Registers and Receivers, and to the Commissioners of the General Land Office. Thus again, in spirit and substance and by *implication*, the latter repealed and modified the former act. By these general and *particular plats*, sent by the Surveyor to the Commissioner, the latter office was informed of all locations made by the Surveyor, not by the Recorder, as provided by the act of 1815. And the "notice and plat" sent by the Surveyor to the Recorder *after the* passage of the act of 1816 was as mere routine performed for the *sake of getting* the patent, but by no means *essential* to the making of a valid location.

If the office of Surveyor General had not been established, and the New Madrid claims had, *in fact*, been located by the *principal Deputy* Surveyor, his return of a notice and plat would have been essential, because the office of principal deputy *was not* an office of *record.* But, after the act of 1816 passed, all surveys were required to be recorded in the office of the Surveyor General, and no where else; and *he* alone could certify copies.

Undoubtedly a *return* of the survey was necessary, as a return of process is—for it is the legitimate *proof* that the survey has been *made*—that is, that the claim *has been* located. But return to the *Recorder of Land Titles* was not necessary. After the act of 1815, he had nothing to do with the surveys, except to be officially *informed* of the perfect and complete location, by the Surveyor General, that he might issue patent-certificate correctly. And it is a little singular that in the very case in which this remark was made, no survey of the *claim* was returned, nor was any *made.* The Surveyor certified to the Recorder that Robertson's claim was

located on a particular *section* of land; and the lines of that section were determined before by the public surveys.

If the *survey*, even, was necessary to make a location, many of these claims were illegally allowed; for there is abundant evidence that many were surveyed long after the time for *locating* had expired.

The simple truth is, that the Supreme Court was right in saying that the mere *application* was not a location; but the location was complete only when a survey was made, according to the application, and returned to the proper office.

But then there is another principle that steps in; and that is, that when these subsequent and necessary acts are done, the whole relates to the day of the application. As Mr. Ames says, "There is no rule better founded in law, reason, and evidence, than this—that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as *one act*, and operate from the substantial part, by relation." We need not multiply authorities on this familiar doctrine. It is enough to refer to *Jackson* v. *McMichael*, 3 *Cowen*, 75. *Caroley* v. *Wallace*, 12 *Missouri*, 145. *Sands* v. *Brant*, 10 *Howard*, 373.

It was, therefore, perfectly in conformity with law to direct a *survey after* the time fixed for *locating* such claims had expired, where the *application* had been made in time. Patents issued, accordingly, upon such surveys, as is shown by the official documents in this case; and we find the Surveyor General certifying, on the 8th of June, 1824, "that in all cases where the surveys for these New Madrid certificates are dated subsequent to the 26th of April, eighteen hundred and twenty-three, the locations were made prior to that date;" and the patents issued upon such subsequent survey furnish ample proof of this also.

That is only what was always held in all the Virginia and Kentucky cases of lands claimed by warrant and survey. It is the simplest possible application of the doctrine of relation, which always applies in every such case. The survey *gives effect* to the selection; it is the realization of it, and, but for the effect of relation, a prior selection, with a survey sooner made, would have taken the land from the early applicant because the Surveyor chose to delay the survey.

The patents on the New Madrid certificates show the date of the survey as the date of the location, but do not recite nor show when the Recorder received the plat and certificate of survey from the Surveyor General.

The commencement and priority of the inchoate title is from the date of the survey. When the patent issues, the title relates to the date of the location, which is the date of the survey recited in the patent, and not to the day when the Recorder received the plat and certificate of survey from the Surveyor General, which is not stated in the patent. The forms of the certificates upon which the General Land Office has acted in issuing patents on New Madrid certificates, are these:

"SURVEYOR'S OFFICE, *January* 15, 1820.
"JOHN ROBERTSON, JR., *Section* 32.

"No. 448—640 acres.

"I certify that section No. 32, in township No. 50, north of the base line, range No. 15, west of the principal meridian, was located on the 8th day of October, 1818, for John Robertson, Jr., or his legal representatives, by virtue of certificate No. 448, dated September, 1818, issued by the Recorder of Land Titles for the Missouri Territory to said John Robertson, Jr., or his legal representatives, for 640 acres of land, in conformity with provisions of the act of Congress of 17th February, 1815, for the relief of the sufferers by earthquakes in the late county of New Madrid.

"WM. RECTOR,
"*Recorder of Land Titles for the Missouri Territory.*
"To FREDERICK BATES, Esq."

"OFFICE OF THE RECORDER OF LAND TITLES,
"ST. LOUIS, *March* 9, 1820.

"I certify that in pursuance of the act of Congress passed the 17th of February, 1815, a location certificate, No. 448, issued from this office in favor of John Robertson, Jr., or his legal representatives, for 640 acres of land; that a location has been made, as appears by the plat of the survey herewith; and that said John Robertson, Jr., or his legal representatives, is entitled to a patent for said tract of land containing, according to said location, 640 acres of land, being, &c., &c.

"FREDERICK BATES.

"No. of survey, 2,810."

The patent issued refers to the plat and certificate of the survey by its number, date of survey, &c., &c. It is ob-

servable that, in the above certificates, (issued in *Bagnell* v. *Broderick*, 13 *Peters*, 458,) the "*location*" was on the 8th of October, 1818; the certificate of the Surveyor to the Recorder bears date January 15th, 1820, fifteen months after the date of the survey; and the patent certificate by the Recorder bore date March 9, 1820, fifty-three days after the Surveyor General's certificate, and a year and five months after the date of the *location*—that is, of the *survey* certified by the Surveyor General. It made no difference *when* the survey was certified to the Recorder.

After the passage of the act of 1816, the surveys of a private claim *could not be returned* to the Recorder of Land Titles. That act really forbade it. For, by its express provisions, all surveys, public and private, made by, under, or through the authority of the Surveyor General, were to be by his deputies *returned to him* to be approved, filed, and recorded in his office. There they remained as public records, from which general and particular plats were to be had, and certified copies obtained, which copies were declared to be evidence in the United States courts. And this retention by the Surveyor of all surveys made by his deputies was not only in accordance with the law, but was the undeviating practice of that officer. It is remarkable that any one is found to assume the converse of the proposition.

In case an actual survey had been made in the location of a claim, it was usual to attach to the *plat* a *copy* of the field notes of the survey, the original being retained; because that was a convenient mode of giving the notice.

But the copy was not indispensable. The law did not require it, but a mere *notice* that the location *had been* made, with a plat, would have been sufficient.

The Supreme Court has, in all the *cases* it has decided upon New Madrid claims, assumed the existence of an official practice and of facts that never obtained or existed. It has supposed, in all, that, when the survey had been made and returned to the Surveyor General, the application, the certificate and survey,—all the papers, in short,—were sent up, together, to the Recorder, for his inspection, examination, approval, &c., and to be and remain deposited and recorded in his office. All that is a sheer mistake. None of these original papers ever left the Surveyor General's Office.

There are twenty-two of these New Madrid claims located in Arkansas, and the application, locating warrant and sur-

vey, are *all* on file *now* in each case, in the office of the Auditor of Public Accounts of the State of Arkansas; that officer being the custodian of the records of the Surveyor's office after the surveys in Arkansas were completed.

And so, likewise, papers of this character were retained by the Surveyor General of Missouri; and when that office was closed, were turned over to a custodian in St. Louis, where they are now.

Unquestionably Mr. Justice Catron must have been misinformed on this subject, when he wrote his opinion in *Lessieur* v. *Price*, 12 *Howard*, 74, where he said, "The warrant or location certificate issued from the Recorder's office; *and there it was returnable. There the plat and certificate were returned and recorded.*"

The Recorder never noted in his office, or any where, the time in which he received New Madrid papers from the Surveyor, or when he passed upon them, or when he recorded them. The papers sent to him were never filed by him, nor attached by him to the patent certificate, and delivered to the claimant for transmission to the General Land Office; and from 1815 to 1836, these papers, sent by the Surveyor General to the Recorder, were never recorded by the latter. The practice of recording them commenced with Frederick R. Conway.

All the inquiry made by the Recorder, on receiving the plat and notice, was to see whether his books showed that he had issued a certificate of allowance of claim in favor of the party for whom the location had been made; and then, whether the number of the certificate on which the location had been made, was the same as appeared by his books. These things ascertained, he granted a patent certificate. The law required no more of him, and he did no more. He did not pass upon or approve the survey, for he could not undo or revise what had been done by direction of, or by, the Surveyor General. The law gave him no *power* to do it, and afforded him no *means* of doing it. *He* could not know whether the land was subject to location: whether it was a sixteenth section, or included a salt spring or lead mine, or was reserved from sale, as included in a Spanish grant, or for other reasons. The Surveyor General had all the field notes and plats of *all* claims, in whatever office or place they had been, prior to 1816. If he had not had them, his surveys would continually have interfered with French and Spanish grants, and there *would* have been "a great field of litigation."

The Recorder's office is still in existence and kept in St. Louis, and there is not now and has not been since the creation of the office of Surveyor General for Illinois and Missouri in 1816, a single survey, or a paper purporting to be a survey, returned by the principal Deputy Surveyor, on file in the said Recorder's office, or the Surveyor General either, of a New Madrid claim, Spanish grant, or other private land claim. But, on the contrary, *all* such original papers are in the Surveyor's office. And the notice and plats, sent by the Surveyor to the Recorder, *are not on file* in the said Recorder's office, but *are* on file in the General Land Office at Washington.

So much for the *practice* as to these claims. What was the settled *law* as to what constituted a location, in like cases, before the Supreme Court held that not the *survey* and its *return* to the office where it was to be kept and recorded, but the transmission of a plat and notice of it by the Surveyor General to the Recorder of Land Titles, and its *receipt* and *approval* by him, constituted the location?

In *Stringer* v. *Young's Lessee*, 3 *Peters*, 320, the law of Virginia required a surveyor to return every survey within three months after it was made. But, the Court said, it did not declare that the validity of the survey should in any degree depend on its being recorded. The validity of the survey is not affected by such failure.

In that case, the survey did not appear to have been recorded at all.

In *Smith* v. *the United States*, 10 *Peters*, 333, a case of a Spanish grant of so many acres to be located at pleasure, the Court said, that the party could have no right of property in any particular land until some act had been done, *by which the grant acquired such locality as to attach to a particular spot.* A grant for so much land, generally, the Court said, must be "*located by a survey*, made by a proper officer." The grant was an authority to the public surveyor, *or his deputy*, to make the survey.

The true dividing line between the executive and judicial powers is laid down in *West* v. *Cochran*, 17 *Howard*, 413, and again in *Kissell* v. *St. Louis Public Schools*, 18 *id.*, 25, thus: "Until a designation, accompanied by a survey or description, was made by the Surveyor General, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries."

West v. *Cochran* was the case of a Spanish grant. The

seventh section of the act of 1807 required that all tracts confirmed by the Board of Commissioners, that had not previously been surveyed, should be surveyed under the directions of the Surveyor General; and that he should transmit general and particular plats of the tracts thus surveyed to the proper Register or Recorder, and also transmit copies to the Secretary of the Treasury. and, on the certificate and plat being filed with the Register or Recorder, he was to issue patent certificates.

This is exactly the process subsequently prescribed as to New Madrid locations; but nobody ever imagined that the location was not complete until the plat and certificate might be filed with the Recorder; or that *he* was to *examine*, *pass upon*, and *approve* the survey.

The Court, in both these cases, regarded the *survey* as completing the right to a patent; and if the decisions of the *State* courts in Virginia, Kentucky, and Pennsylvania are referred to, it will be found that nothing *can* be better settled than that, as the Supreme Court of the United States always held, except as to New Madrid claims, the *survey* itself, regularly made and returned, severed and carved out the land from the public domain and was the location.

Under an agreement with the State of Michigan, that section No. 16, in every township, *should be granted* to the inhabitants of the township, for the use of schools, the Court said, in *Cooper* v. *Roberts*, 18 *Howard*, 179, that "until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to make out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title. The *jus and rem* becomes, by the performance of that executive act, a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

In *Cousin* v. *Blanc's Executor*, 18 *Howard*, 210, the Court said, "Cousin's title (a confirmation with order for location and survey, made by the Register and Recorder,) had no standing in a court of justice until the land was surveyed, and the survey approved as a proper one at the Surveyor

General's office. * * The mere loose *order* of survey * * cannot be recognized in this case as conveying any vested interest."

So in *Bryan* v. *Forsyth*, 19 *Howard*, 334, the Court held, that, in cases of confirmed Spanish claims, an action of ejectment would be maintained when a survey had been duly made and approved and recorded in the Surveyor General's office. When the surveys were made, and plats returned, and approved and recorded by the Surveyor General, and recognized as valid at the General Land Office, it bound the parties to it, the confirmee and the United States.

In *Lessee of Lewis* v. *Meredith*, 3 *Wash., C. C. R.*, 84, on the subject of warrants and surveys in Pennsylvania, the Court said that, if a person, applying for land, specified with sufficient certainty the land he meant to appropriate, the appropriation was called a *special* one, and the warrant a special warrant. That amounted to a location immediately: and that would have been, under general law and in very fact, the case with the application of Rector and Hammond, but for the statute's defining a location to mean a survey. For their application so specified the tract selected as free, and defined it with sufficient certainty.

But where the warrant gave a right to only a certain *quantity* of land, to be fixed and located at a future day, by a survey, that was called a *general* warrant; and under these there was a location "*when the survey was made and returned.*"

And in *Dubois* v. *Newman*, 4 *Wash., C. C. R.*, 77, the Court said, "To complete the legal title, the plaintiff must show a legal *survey.* He must produce the survey regularly made, or, at least, he must prove, by parol evidence or otherwise, that a survey of the land in dispute was actually made, for the holder of the warrant." They had before said, "A general or indescriptive warrant amounts to a location, *when it is surveyed*, and not before."

As to the survey made in 1838, on the order of the Surveyor General, and in obedience to standing instructions, it could be valid only as a resurvey. The Surveyor General had no power to order it for the purpose of *locating* the claim, because the act of 1832 had reserved it from location as well as from entry. His intention, also, was to have ascertained the lines of an existing location, in order to close the public surveys on them. If the lines had ever become effaced, so that they could not be retraced, (as was supposed to be the fact,) it would have been but a resurvey; and that is what

it was meant to be. Supposing the marks no longer to exist, the Surveyor General recurred to the application and directed a resurvey *strictly* in accordance with that. Upon his hypothesis, he could in no other way have the location resurveyed, even with the aid of the old plat. If the marks were gone, and the bearing-trees cut down, and the posts rotted or burned, the description in the application, and the plat were the only guides.

This resurvey, of course, related to the original application; and if the old lines could not be run again, it might be so resurveyed, to-day, by the calls of the application. Rector thought so, and that he had a right to accept this resurvey; but no man knows *all* the law; and he did *not* know that it was necessary for him to show, at the same time, the evidence of the survey of 1820. He does not lose his title by that, any more than he would have lost it if the old lines had been wholly effaced, as he, also, thought they were.

Now, in relation to the notion of an *exchange* of land by the New Madrid claimant and the Government, we repeat, 1st, that there was none contemplated. An *exchange* of lands is effected by *contract*. Exchange, *Permutatio*, is a *contract*, by which one of the contracting parties binds himself to give a thing to another, in the place immediately of another thing, which the other contracting party binds himself on his part to give *him*.

The contract of exchange resembles the contract of sale. In the early ages of the world it took the place of that contract. Wherefore the Sabinians held that it was a genuine contract of sale. (L., 1, ff, de Contrah., empt.) The Proculeians held that it differed from a contract of sale, because each of the things is both the thing and the price, and each party both buyer and seller. (L., 1, §1, ff, de Contrah., empt.)

At all events, it *resembles* the contract of sale, and is of its nature. *Permutationem vicem emptoris obtinere non est juris incogniti. L.* 2, *Code, de rer permut. Permutatio vicina est emptioui. L.* 2, *ff, de Permut.*

Each party warrants against eviction and encumbrances. *Pothier., Traité du contrat de Vente Part* vii, Article v, Nos. 618, 620, 621, 623.

Certainly it must seem, on reflection, a grave error to have spoken judicially of an *exchange* of lands, as contemplated by the New Madrid act; because it is not allowable, in judicial decisions, to use words in any other than their legal meaning, lest injustice and judicial wrong-doing should

be the consequence; and it is quite certain that, in the legal meaning of the word, no *exchange* was contemplated by the law.

But, 2d, the United States *has* taken, more than fifty years ago, a formal relinquishment of title from Langlois. He sold his injured land to Story, and he conveyed to the Government. In *Rector* v. *Ashley*, no relinquishment appeared, and this was relied on by Ashley's counsel, in argument, as a ground for holding the location and claim invalid. The Court, upon its own premises, would necessarily hold so, if it were shown that the party still owned the injured land. It did so hold in one case, when the owner of the land proved that he had never sold or located or made any claim, and that he knew nothing about it for many years.

Now, in every such transaction, there must be mutuality. The Court declares that, if the claimant has not relinquished his land, he cannot have the land selected in lieu of it. The converse of the proposition *must* be equally true. If he *has* given up his land, if the United States has taken it, and had it for fifty years, or sold it, it cannot refuse to confirm to him the land selected in its stead, if it was *public* land when he selected it, and its sale not forbidden: for if not *forbidden*, it was *authorized* by law. All the public land is divided, and always has been, into these two classes. When the Government takes title, it must give title. An exchange is where one thing is *immediately* given for another. The two conveyances, the Court has said, must be *concurrent*. On that ground it has *destroyed* New Madrid locations. It was a hard and harsh decision—but if, as it said in *Lessieur* v. *Price*, "a concurrent vestiture" of title must occur, the injured land *must* have vested in the United States *at the time* that title was taken by the new location;" and if there is no location *until* the United States takes title, then, on the other hand, by the same stern and inflexible rule, the United States could not, by unfounded objections, *defeat* the location, and at the same time *retain* the injured land. They have had that of Langlois, for which Rector and Hammond paid six hundred and forty dollars, (Rector, in fact, six hundred for half of it,) fifty years. Are we not entitled to *demand* the land selected by way of "exchange?"

The act of the officer is the act of the Government. How can his erroneous decisions *preventing* the doing of the very things which the Court deems indispensable, give the Government a right to rely on the party's *failure* to do those

things, as a ground for a right to hold *back* the injured land and the land selected in *exchange* for it? Can the Government, then, rely on its own act of 1832, *reserving* the latter from sale, entry or location, as a muniment of its title to retain it? On the doctrine of the Court itself, the title of Rector to the land is incontrovertible.

And it is so, as we will show, so plainly and clearly that no man can deny it unless he has to interpret or administer what goes by the name of 'law' in some department or bureau, *that there never was any valid, legal, lawful or reasonable objection to the location of the claim of Langlois*, and that the United States have had no more right of property in it, for fifty years, than they have had in Rector himself. And, also, that every act of Congress for the purpose of curing defects in that and similar locations, was wholly unnecessary to give them legality, and only necessary in consequence of objections that were frivolous, futile, and made in ignorance of existing facts.

Nothing in the cases of *Bagnell* v. *Broderick* and *Barry* v. *Gamble* conflicts with the sound principle we have quoted from *Lytle and others* v. *The United States*. The uniform *professions*, if not always the practice of the General Land Office have always been in accordance with this just and salutary principle. And, the case in which the Commissioner of the General Land Office stated it, in 1836, cited above, was, that the claimant applied, a few days before the act of 1834 expired, to prove up his pre-emption and enter the land; but there was a vacancy in the office not filled until after the act had expired, which prevented him; after which, he filed his proof and attempted to enter the tract, was refused permission, and appealed to the General Land Office. That office instructed the Register and Receiver to allow the claim, if they were satisfied it came within the act; and the Secretary of the Treasury, the Hon. Levi Woodbury, approved the decision. *Instr. & Opin.*, 539.

In the present case, in consequence of the decisions of the Secretary of the Treasury and Attorney General, the owners of the Langlois claim could do nothing, after their location of the claim by selection of the land, including the Hot Springs, and by survey of it made and returned to the office of the Surveyor General. The obstacle was illegally interposed. After the act of 1832 passed, at any rate, *the single objection that remained*, and which did not disappear until August, 1854, was that the Quapaw title had not been extinguished on the 17th

of February, 1815; and that objection created an obstacle which absolutely prevented the recording of the survey and its transmission to the Recorder of Land Titles.

It is true that the Supreme Court had endeavored to explode it long before.

In *Stoddard* v. *Chambers*, 2 *Howard*, 318, it had said, and it repeated the same words in *Easton* v. *Salisbury*, 3 *Howard*, 431:

"The location of Chambers was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. *Had the entry been made* or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was reserved by the act of 1832, the title of the defendant would not be contested."

And, in the latter case, the Court took pains to show that these words were meant to be taken in their fullest sense, and as a declaration that if the sale of the lands had been authorized, i. e., *if they had not been expressly reserved from sale, as it was held they were*, at the time of the *location*, that location would have been valid. In the same case they said: "A holder of a New Madrid certificate *had a right to locate it on any of the public lands which had been authorized to be sold.* * * * The President of the United States has no right to issue patents for land, the sale of which is not authorized by law."

It is true that the Court has never been able to determine the meaning of the phrase, as applied to the public lands—"the sale of which is (or may be) authorized by law." It has always inclined to give it too narrow a meaning. We will inquire as to that hereafter.

In *Barry* v. *Gamble*, 3 *Howard*, 32, the notice of location was filed on the 7th of July, 1817, with the Surveyor General. The land was surveyed by authority of the United States (as part of the public surveys,) in the fall of 1817, but the survey was not closed until the spring of 1818.

In April, 1818, the New Madrid claim was located by a Deputy Surveyor, in a square form, disregarding the cardinal points, and calling for the lines of other tracts as boundaries. Sale of the adjoining lands was not directed by the President until June 13, 1823, and the surveys were not returned to the General Land Office until some time in 1820. Patent issued on the New Madrid location in 1827.

The opinions of Messrs. Weid and Butler were relied on, to prove that the land was not public land, the sale whereof was authorized by law; it being covered by a Spanish claim,

and the act of February 15, 1811, not authorizing the President to sell lands so situated.

The Counsel stated that, in 1817, there was no law in force for the sale of land in the St. Louis District; nor was there then in existence, either a St. Louis Land District or a St. Louis Land Office, or any further survey made according to law.

The Court said, speaking of the objection that until the land had been *offered* for sale, under proclamation of the President, no valid location of a New Madrid claimant could be made on it, that, "It could not have been intended by Congress that the sufferer should surrender his injured land, get his warrant from the Recorder, and then be compelled to wait until after the public sale, which might sweep all the lands out of which he could obtain a new home.

And so the Court decided that these claims might be located on lands before they were offered for sale, or even surveyed by the public Surveyor.

The disregard of the lines of the public surveys, in making this location, was cured by the Act of 1822, but the question remained whether it was made on lands the sale of which was authorized by law.

The Court held that the Act of 1822 had cured but that one single defect; and that the New Madrid sufferers were preferred claimants, having, like others who had a legal preference, a right to buy, so soon as the officers of the government had a right to sell; and sales could be made founded on public surveys.

But here was another error. The law did not contemplate locations according to the public surveys. *There were none in Missouri, in* 1815. It was "*contemplated*" that each claimant was to have his land specially and particularly surveyed, in any shape or figure he might choose, and all the objections made by the authorities at Washington were simply endeavours to thwart the purposes of the law;—which, curiously enough, seems *always* to be the first object, whenever the law to be resisted is a *beneficial* one.

The Court broadly held that Lafleur's New Madrid location, though located on unsurveyed lands, *was* rendered valid by the Act of 1822; saying that so it was decided, in fact, in *Stoddard* v. *Chambers*. And this, although Mr. Justice Kinley showed that the section lines had not been run when the location was made; and he and Justices Story and Wayne insisted that the sale of the land was not authorized by law when the Act of 1822 was passed, and not until 1823.

But, notwithstanding these explicit decisions, settling at least that one miserable technicality, the Department of the Interior adhered to it until 1854. It died hard. It is a curious feature of the idiosyncrasy of the administration of the public lands, that as soon as a law passes for the benefit of those equitably entitled to lands, every resource of ingenuity is availed of to find some mode of rendering the law useless and impotent. The General Land Office is always in arms against even pre-emption claims, and has succeeded in defeating a multitude of them. Every claim even of a right to *buy* land at the Government's own price is deemed to be, *prima facie*, an attempt to *wrong* the Government, and almost a personal wrong to the Bureau itself, especially if a railroad corporation wants the same land by way of gift. And the devices unconsciously resorted to under the stress of this prejudice would be provocative of amusement, if they were not the cause of vast wrong and injustice. Look at the Act of March 1st, 1843. It undertook to make valid all the New Madrid locations, pre-emptions under the Act of 1814 and Cherokee pre-emptions, in Arkansas, south of the Arkansas river. *The Department of the Interior and General Land Office have prevented its validating a single one of either.* And all the previous laws, that of 1822 and the others, were to a great extent paralyzed in the same way. The case of *Cunningham* v. *Ashley*, in which the Supreme Court brushed away a whole network of official cobwebbery, affords a fair specimen of the persistent endeavors of the Office and Department to defeat, if possible, and when that cannot be done, to delay, the confirmation of claims. This case of Rector is a still more striking one; for it is a case in which title has been denied for more than half a century, on a perfectly valid location, to which there never was a valid objection from the beginning, upon mere quibbles and ignorance of the meaning and intention of the law, and of that condition of things which was the laws real and best interpreter, and of which those who administered the Land Office should have been better informed than any man.

Of course the Government cannot now object to this claim, that the survey was not recorded, and that it was not returned to the Recorder of Land Titles; for its officers, whose acts are the acts of the Government, having the whole weight of authority of the Executive Departments, had, by an objection that had no validity, and which the Government has long since, by its officers, acknowledged to

and the act of February 15, 1811, not authorizing the President to sell lands so situated.

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The disregard of the lines of the public surveys, in making this location, was cured by the Act of 1822, but the question remained whether it was made on lands the sale of which was authorized by law.

The Court held that the Act of 1822 had cured but that one single defect; and that the New Madrid sufferers were preferred claimants, having, like others who had a legal preference, a right to buy, so soon as the officers of the government had a right to sell; and sales could be made founded on public surveys.

But here was another error. The law did not contemplate locations according to the public surveys. *There were none in Missouri, in* 1815. It was "*contemplated*" that each claimant was to have his land specially and particularly surveyed, in any shape or figure he might choose, and all the objections made by the authorities at Washington were simply endeavours to thwart the purposes of the law;—which, curiously enough, seems *always* to be the first object, whenever the law to be resisted is a *beneficial* one.

The Court broadly held that Lafleur's New Madrid location, though located on unsurveyed lands, *was* rendered valid by the Act of 1822; saying that so it was decided, in fact, in *Stoddard* v. *Chambers*. And this, although Mr. Justice Kinley showed that the section lines had not been run when the location was made; and he and Justices Story and Wayne insisted that the sale of the land was not authorized by law when the Act of 1822 was passed, and not until 1823.

But, notwithstanding these explicit decisions, settling at least that one miserable technicality, the Department of the Interior adhered to it until 1854. It died hard. It is a curious feature of the idiosyncrasy of the administration of the public lands, that as soon as a law passes for the benefit of those equitably entitled to lands, every resource of ingenuity is availed of to find some mode of rendering the law useless and impotent. The General Land Office is always in arms against even pre-emption claims, and has succeeded in defeating a multitude of them. Every claim even of a right to *buy* land at the Government's own price is deemed to be, *prima facie*, an attempt to *wrong* the Government, and almost a personal wrong to the Bureau itself, especially if a railroad corporation wants the same land by way of gift. And the devices unconsciously resorted to under the stress of this prejudice would be provocative of amusement, if they were not the cause of vast wrong and injustice. Look at the Act of March 1st, 1843. It undertook to make valid all the New Madrid locations, pre-emptions under the Act of 1814 and Cherokee pre-emptions, in Arkansas, south of the Arkansas river. *The Department of the Interior and General Land Office have prevented its validating a single one of either.* And all the previous laws, that of 1822 and the others, were to a great extent paralyzed in the same way. The case of *Cunningham* v. *Ashley*, in which the Supreme Court brushed away a whole network of official cobwebbery, affords a fair specimen of the persistent endeavors of the Office and Department to defeat, if possible, and when that cannot be done, to delay, the confirmation of claims. This case of Rector is a still more striking one; for it is a case in which title has been denied for more than half a century, on a perfectly valid location, to which there never was a valid objection from the beginning, upon mere quibbles and ignorance of the meaning and intention of the law, and of that condition of things which was the laws real and best interpreter, and of which those who administered the Land Office should have been better informed than any man.

Of course the Government cannot now object to this claim, that the survey was not recorded, and that it was not returned to the Recorder of Land Titles; for its officers, whose acts are the acts of the Government, having the whole weight of authority of the Executive Departments, had, by an objection that had no validity, and which the Government has long since, by its officers, acknowledged to

have been wrongfully interposed, prevented the performance of these very official acts which the law made it the duty of these officers to do.

And the Supreme Court, in saying that a location consisted not in the notice of the claimant requesting the survey of particular lands, but in the survey and its return to the Recorder of Land Titles, did not mean to say that, if the survey was actually made, and returned to the Surveyor General, and its transmission to the Recorder of Land Titles was prevented by an accident, or by the omission of duty on the part of the Surveyor General, or by an unfounded objection interposed by the General Land Office or Treasury, the actual return to the Recorder was indispensable. For, if that manner of construction or interpretation had prevailed in Rome, the Prætorian Edict would never have had a beginning, much less become a code.

So long as the Government persisted in its objection, the owners of this claim could not lose their rights. Having asked for and obtained the survey and its return, they could rightfully and safely wait until the Government should remove the impediment, as it had already removed others that were substantial.

By the Act of 1815, and the subsequent acts confirming locations under it, Rector and Hammond had a valid right to take the lands in question in exchange for those Langlois had released and conveyed to the United States. So soon as, upon their application and selection of the lands, they had been surveyed, and so severed from the public domain, and the survey was returned to the Surveyor General, their location was made and the lands were theirs. It is very doubtful, under the Act of 1816, whether it was necessary to forward a copy of the survey to the Recorder of Land Titles. At all events, the survey, which constituted the location, was complete so soon as it was returned to the office of the Surveyor General, for it was to be recorded there, and a copy certified by that officer was plenary evidence in any court of the fact of the survey.

Of this vested right to a patent they might be denuded by neglect or abandonment. But so long as the Government interposed an obstacle that had no validity and no lawful existence, and so prevented the recording of the survey, or its approval by the Surveyor General, and its transmission to the Recorder of Land Titles, just so long there could be no neglect on the part of the claimants. The Govern-

ment cannot take advantage of her own wrong, which the illegal decisions of her officials are. Certain principles of law and morality apply alike to Governments and men. No one can prevent another from doing an act, and then have advantage from his failure to do it.

The law, in many cases, says, without qualification, that a tender is indispensable. But the courts, like the Prætors, say that if the party to whom the tender should be made, prevents its being made, or informs the party who should make it that he need not do it, because it will not be accepted, the failure to make the tender is excused. No one, Government or individual, can say to another, "I told you beforehand that you need not offer the money, for if you did I would not receive it;" and at the same time say, "You shall lose your right and have no title, because you failed to make a tender."

In *Taylor* v. *Brown*, 5 *Cranch*, 234; *Craig* v. *Radford*, 3 *Wheaton*, 594; and *Stringer* v. *Young*, 3 *Peters*, 320, it was decided that the titles to lands in Virginia were not invalidated by the omission of the Surveyor to record the survey; that provision of the act being merely directory. So are the provisions of the New Madrid act in regard to the transmission of the survey and notice by the Surveyor General to the Recorder of Land Titles, and the recording of the same by him. The act expressly declares that it shall be the duty of those officers, respectively, to do these acts, and imposes no duty whatever on the claimant in regard to them.

Could a claim be any more invalidated, if, instead of *neglecting* to transmit the survey, or to retard it, the Surveyor General was forbidden to do it by his superiors, by the interposition of an unlawful and invalid objection which required him to treat the survey as illegal and void?

The *right to locate* two hundred arpents of land somewhere, and *the location in fact*, by actual survey made by direction of the Surveyor General, by a sworn Deputy Surveyor, are proven. Not a fact is wanting. The case is absolutely perfect.

Now we say there never was a valid objection, from the beginning, to this location. Let us consider the questions presented by the various objections that have been at different times made to its validity.

And in investigating these questions, the present value of the property is not of the least importance, and any influ-

ence it might have would be as illegitimate as the influence of a bribe. The Court has *nothing to do* with its value. To it, it is precisely the same thing, whether it is worth the revenue of a realm, or no more than the barest hill-top in a waste land. To attempt to influence a Court by allusion to it, would be a criminal endeavor to corrupt the fountains of public justice and to dishonor the Government that permitted a resort to measures illegitimate and censurable.

These questions of law are:

1st. That the location was invalid, because made on a square, and before any public survey of the neighboring lands; the law of 1815 requiring all locations to conform to the lines of the public surveys.

2d. That locations of New Madrid claims could be made only upon lands that had been directed to be surveyed, for the purpose of being offered for sale at St. Louis—the act of 1811, directing that the lands *so surveyed* should be offered for sale.

3d. That lands which the President had not directed to be prepared for sale, were not lands, the sale of which was authorized by law.

4th. That the Territory of Missouri, within the meaning of the pre-emption act of 1814, was the territory as organized into counties; and that, when the New Madrid act passed, no part of that territory south of the River Arkansas had been organized into counties.

5th. That the location of a New Madrid claim could only be made on lands, the sale of which was authorized by law on the 17th day of February, 1815, when the New Madrid act was passed, and that the sale of the lands south of the River Arkansas was not authorized by law while the Quapaw title remained unextinguished, as it did until August 24, 1818.

6th. That the reservation contained in the act of 1832 was not set aside or recalled or rendered no longer applicable to the Langlois location, by the act of March 1, 1843; because the latter was general and the former special; and because the latter only proposed to cure the single defect of the non-extinguishment of the Quapaw title, at the time of the passage of the New Madrid act.

We will consider these propositions and objections in the order in which we have stated them.

1st. This objection was removed by the act of 26th April 1822, entitled "An act to *perfect* certain locations and sales

of the public lands in Missouri, (3 *Stat.*, 668,) which provided that *the locations* therefore made, of warrants issued under the act of 1815, if made in pursuance of that act in other respects, should be perfected into grants in like manner as if they had conformed to the sectional or quarter sectional lines of the public surveys. That objection, therefore, disappeared as to all such locations. It never was valid, as we shall show.

For the present, we simply say that the act of 1815, authorizing the claimant, in every case, to locate by a special survey, itself proves it was not intended that the locations should be by sectional subdivisions, or according to the *public* surveys.

2d and 3d. There were one and the same objection, the attempt to limit the location of New Madrid claims to the lands that were to be sold at St. Louis resting on the fact that these were the only lands that had been directed by the President to be surveyed.

The one question, therefore, was, whether the sale of lands was "authorized by law" as soon as a law was enacted providing for their survey and sale at such future times as the President should be pleased to designate; or whether it was not so, until he had actually directed the survey.

The New Madrid act gave the right of location in very general terms, "on any of the public lands of the said Territory, the sale of which is authorized by law;" lead mines and salt springs being excepted.

The State of Louisiana was admitted into the Union on the 8th April, 1812; and on the 4th of June, 1812, the residue of the district of Louisiana, (which consisted of all the country ceded by France on the 30th of April, 1803, except the portion included in the Territory of Orleans,) became the Territory of Missouri, (3 *Stat.*, 645;) and on the 2d of March, 1819, all that part of the Territory of Missouri lying south of a defined line, was erected into a separate Territory called Arkansas Territory, the act to take effect on the 4th of July, 1819. (3 *Stat.*, 493.)

The statute creating the Territory of Missouri, provided that the Territory theretofore called Louisiana, should thereafter be called Missouri. By section 7 the Governor was empowered to lay off into counties, for the election of representatives, the parts of said Territory to which the Indian title had been extinguished.

The district of Louisiana was created by the act creating

Louisiana into two Territories, and providing for the temporary government thereof, (2 *Stat.*, 277,) passed on the 26th of March, 1804. By it, all the country ceded by France to the United States, under the name of Louisiana, which lay south of the Mississippi Territory and of a line on the west of the River Mississippi, commencing on that river at the 33d degree of north latitude, was constituted the Territory of Orleans: and, by section 12, the residue of the Province of Louisiana, ceded to the United States, was made the District of Louisiana.

Any of the lands within the limits of this wide Territory, except those in which there were lead mines or salt springs, or which there was claim of title under French or Spanish grant, or right of pre-emption under the act of 1814, was open to be located by New Madrid claims *if its sale was authorized by law*. Whether that expression meant authorized when the New Madrid act passed, or whenever the location might be made, we will inquire hereafter. Here, we are to endeavor to fix the meaning of the phrase, "*authorized by law*."

When is land authorized *by law* to be sold? Undoubtedly the phrase is susceptible of different constructions; but the *true* meaning ought to be ascertainable with some degree of certainty, from the laws and the judicial interpretation of them.

It could be contended that it meant when, under authority given by law, particular lands were ready to be sold, and individuals could go to the proper offices and purchase them. That would be when they had not only been surveyed, but when they had been ordered to be exposed to public sale, and the day of sale should have come.

Or, it conld be contended that it was when the President, being authorized to do so by a law, had directed them to be surveyed, and *prepared* for sale; which was not the decision of Commissioner Meigs. But certainly one could not yet purchase. The land officers were not yet authorized to sell, but only to get ready to sell. The sale in such case was in one sense *authorized to be made*, because it needed no further ruthority of *law*, but only the action of the surveyors and other ministerial officers whose duties were already defined by law. It was authorized to be made, at some uncertain time in the future, dependent on the performance of those duties, and perhaps on further order from the President.

As far as the *law* went, the sale was no more authorized

by it, after the directions for preparation given by the President, than it was before he had given those directions, but after the law had authorized him to give them. If the law did not authorize them to be sold when it authorized the President to take, at his discretion, the necessary measures to have them sold at some future time, then *the law* did not authorize it until the moment came when individuals could purchase. The *law* spoke but once; what it authorized, it authorized *then*. If one has property, real or personal, which is his to sell, and he executes authority to an agent to sell it at his discretion, but certain things are necessary to be done before he can sell it, as, for example, to have it brought from a distance, or to pay certain charges on it, or to have certain repairs made, and the agent is not restricted to the time, but may at his pleasure delay doing these things, or selling after they are done, can it be said that the sale of the property is not *authorized* by the owner, until the agent actually *offers* it for sale, or until the preliminary arrangements have been effected? Has not the owner authorized the agent to sell, though at some future day? It may be answered, He is *not* authorized to sell, because he *cannot* sell, as yet. But if the agent's power to sell was to be authorized by written authority from the principal, would not the word "authorized" necessarily mean the receipt of that written authority; and could it be said that he would not be authorized thereby to sell, until he chose to do, or until he had done or effected certain things, which he might delay doing as long as he pleased?

So it is *the law* by which the sale is to be authorized; and not the order or direction of the President. The sale is to be authorized *by law;* and there is and can be no middle ground; either it is authorized by law when the law ends its functions, utters its word, and, giving the authority, leaves it to be exercised when the President shall please, circumstances permit, or the necessary preliminaries can have been arranged, or it is not authorized by law until the moment when sales can be *made*.

The propositions contained in Nos. 2 and 3 were without any ground of reason whatever to stand on. They were simply senseless and arbitrary. The word 'authorized' can have but one of two meanings. An act is either authorized to be one, when authority is given to do it, or when, under authority previously given and then becomes effectual, it can be done. Now, suppose a man executes a power of sale,

the sale to be made at the discretion of the agent, or as soon as he can have the land surveyed and laid off into lots—can it be said that there is no power to sell until the moment when he is ready to make the sale. In one sense it could be said that he had no *power* to sell, until he could sell; but that is not the legal meaning of the word. The power to sell, in the legal sense, has existed from the moment of the execution of the instrument containing the power; and whenever the sale may be made, *it will relate to the date of the power*, and cut out encumbrances created by the owner of the power subsequently made. *Authority* is a word that has a meaning to which only one meaning of the word power answers. The President derives his *authority* from a certain act under the Constitution. That is his *power* of attorney; but he may not have the *present* power to do it at all, but only to do it when a certain contingency arises. A person acting by authority of a court, of a law, of a will, has the *authority* to act before he can do the act.

The words "by law" in the phrase "authorized by law" explain the meaning of the word "authorized." They fix and confine it. If we say that one is authorized by a bill to do certain acts, we mean that the bill gives him the authority to do the acts; not that he *can* now do them; that he can now *exercise* the *authority* which he *possesses*. We are fully authorized to do many things that we never do. A sale of lands might be authorized by law, and yet the sale be impossible at first, and continue so, or become impossible by subsequent events, or by an enemy's conquest of that portion of the country.

We contend, therefore, that the sale of the public lands of the United States was authorized by law in the Territory of Missouri whenever the law declared them the subject of sale, and that steps might be taken to put them on the market. We know of no reason that should require the preference to be given to the narrower construction, in regard to the location of New Madrid claims. On the contrary, all the same rules of construction are in favor of the liberal one.

It was for the interest and benefit of the United States that the country west of the Mississippi should be peopled. It was desirable that what is now the State of Arkansas should be so, as much as the country in the vicinity of St. Louis or in the organized counties should be. If it were not, how were more counties ever to be organized. The

interest of the United States controlled their policy, and led them to encourage the penetration of the unsettled wilderness by the pioneers of civilization, whose axes have proven more potent than either the sword or the pen. Why should they not have permitted New Madrid claims to be created in Arkansas? Surely the land was *worth* less to the Government in an unsettled wilderness of unbroken woods, far from all the haunts of men, and into which only a "trail" from the Post of Arkansas, traversed by Indian traders and hunters on horseback, had penetrated. Surely the Congress did not desire to compel the claimants to remain in the vicinity of St. Louis, or to select their new lands only in the organized counties.

It is curious with what microscopic vision acts of Congress, making generous gratuities to the unfortunate, rewarding the advanced patrols and pioneers of freedom and civilization for braving the dangers and contemning the hardships of the wilderness, or endeavoring to secure equitable rights to portions of the vast masses of the public lands, have generally been scrutinized by Secretaries, Attorneys General, and Commissioners of the General Land Office. They have for the most studied the language for the purpose of defeating the objects that Congress had in view, rather than of giving their wise and generous purposes effect. Their arguments have too often worn the appearance and had the savor of the defences of retained attorneys against the justice and right of claims, by means of which, it is certain, the most crying injustices have been perpetrated; and there is no more striking example of this truth than the New Madrid claims afford. To crown the injustice, it is only necessary for the counsel of the United States to insist that for the failure to do that which the Government officers by unsound and even absurd decisions prevented the claimants' doing, they shall be held in default and their claims be, therefore, deemed imperfect and invalid.

Of the *value* attached to lands by the Congress of the United States in 1815, some idea may be formed by reading the acts of 24th February, 1810, (2 *Stat.*, 556,) 23d April, 1812, (2 *Stat.*, 712,) and 29th April, 1816, (3 *Stat.*, 326,) providing lands for refugees from Canada and Nova Scotia, by which individuals among these were given, respectively, 640, 960, 1,000, and 2,240 acres of land east of the river Mississippi; and subsequent laws giving vast bodies of land, not only west of Arkansas, but in what is now that State, to Indian tribes.

By resolution of the Congress of the Confederation, of 21st April, 1787, it was provided that after the Secretary of War should have drawn certain lands, the remainder should be advertised for sale, and, at the expiration of five months, the sale of the land should commence and continue from day to day.—*Old Journals, Vol.* 4, *p.* 739.

And on the 9th of July, 1788, it was ordained, "that the Board of Treasury be, and they *hereby* are, *authorized* and *directed to sell* certain lands, on the same conditions and under the same restrictions and limitations as were prescribed in the resolutions of April 21, 1787, except as to the place of sale.—*Old Journals, Vol.* 4, *p.* 832.

The expression "*authorized to sell*" occurs here for the first time, so far as we have been able to discover, and it is clear that the sale was understood to be 'authorized' *by the ordinance*, at its date, though not to be *made* until afterwards.

So in the act of May 26, 1824, for the disposition of certain lands retroceded by the United Brethren, (4 Stat. 50,) we find, "the President shall be, and *he is hereby, authorized*, whenever the boundaries of the several lots, &c., shall be ascertained, to issue patents, &c.—*Sec.* 5.

The act of 18th May, 1796, entitled "An act providing for the sale of *the lands* of the United States in the Territory northwest of the river Ohio, and above the mouth of Kentucky river," (1 *Stat.*, 464,) provided for surveying *all* those lands, for selling as soon as seven ranges of townships should have been surveyed, in one of three specified localities, and the undivided townships afterwards. And it was, as its language reads, an act *providing* for the sale of *all* those lands, directing them to be offered for sale and authorizing them to be sold. All were to be sold "under this act;" "disposed of by virtue of this act." Could it be said that the sale of them was not "authorized by law" as soon as the act passed?

On the 10th of May, 1800, an act to amend the act was passed, (2 *Stat.*, 737,) "for the *disposal* of the lands of the United States, directed to be sold" by the former act. It prescribed the making of surveys, the offering for sale, the selling at private sale, &c.; provided by the 4th section that the Registers of two offices, at one of which no further sale was provided, *might* sell *any* of the lands within their districts, at private sale, after a particular day; and the 16th section gave rights of pre-emption to persons who had erected or begun to erect mills "upon any of the lands *herein* directed to be sold."

Certainly to *direct* lands to be sold is to *authorize* them to be sold; and lands were, by this act, thus directed and authorized to be sold, which had not yet been surveyed.

The act of 3d March, 1803, regulating the grants of land, and providing for the disposal of the lands of the United States south of the State of Tennessee, secs. 10, 11, 12, (2 *Stat.*, 233,) provided for surveying *all* the lands in Mississippi Territory, east and west of Pearl river, and for their sale, with certain specified exceptions, at such times as by proclamation of the President should be designated. And the act of 26th March, 1804, for the disposal of the lands in the Indian Territory, made the same provisions, by secs. 1 and 5, (2 *Stat.*, 277,) as to *all* the public lands of the United States in which the Indian title had been or should thereafter be extinguished, north of the Ohio and east of the Mississippi. *All* these lands, it was provided, should be sold on such days as the President should designate by proclamation.

And sec. 10 provided how all the public lands of the United States, "*the sale of which* IS *authorized by law*," might, after they had been offered for sale to the highest bidder, be purchased by whole, half, or quarter sections, at the option of the purchaser.

Evidently the phrase as here used meant all of the lands of the United States, which, not being reserved, or their sale otherwise forbidden, or might be the subject of sale. For the provisions that they may be sold at private sale, by parts of sections, and that, in that case, they shall be subdivided in a particular way, are general, applying to all lands that may at any future time be offered for sale to the highest bidder.

The phrase in question is precisely the same in effect and meaning as the phrase "directed to be sold at public sale," in section 12. The provision here is, "that *all* the other public lands of the United States, either north of the Ohio or south of the Tennessee, *which* ARE *directed to be sold at public sale*, shall be offered for sale to the highest bidder in quarter sections."

Now, most of these lands were not to be sold, under the two acts, until the President should, in his discretion, direct it. Yet all these are "public lands directed to be sold by law," and of course *authorized* by law to be sold; for no further *legislation* was necessary. The law had done its work and performed its part; and when it said that all the lands,

with certain specified exceptions, might be sold, it *authorized* them to be sold.

The act of 2d March, 1805, sec. 7, (2 *Stat.*, 329,) extended over all the public lands of the United States to which the Indian title had been, or might hereafter be, extinguished in the Territory of Orleans, the powers vested by law in the surveyor of the lands of the United States south of the State of Tennessee; and made it his duty to cause such of said lands as the President should expressly direct to be surveyed and divided; and the supplementary act of April 21, 1806, (2 *Stat.* 391, *Sec.* 11, enacted thus: "That the President of the United States be, and he *is hereby*, authorized whenever he shall think it proper, to direct so much of the public lands lying in the Western District of the Territory of Orleans, *as shall have been surveyed*, in conformity with the provisions of the act to which this act is a supplement, to be offered for sale." He was *thereby* authorized to offer them for sale, though they were not even to be surveyed until he should expressly direct it. Was not authority to offer them for sale, authority given by law to sell? And if the *offering* them for sale was, *then* and *thereby*, by that *law*, authorized, was not their *sale*, *then* and *thereby*, authorized by law? What juggling with words could make it otherwise? Only that of giving the wrong meaning to a word that has two or more, according to circumstances, which is that *cavillatro*, "*ut ab endenta veris per brevissimas mutaiones desputatio ad ea quæ evidenter falsa sunt, perducatur*," so largely used in the controversies of the modern forum.

So, in the act of the 31st March, 1808, sec. 1, (2 *Stat.*, 480,) we read: "That, whenever the President of the United States has been or may be authorized to cause the public lands, in any land district, to be offered for sale, it shall be lawful," &c.

But the act of 15th February, 1811, is conclusive as to the meaning of the phrase in question. The act of 28th February, 1806, (2 *Stat.*, 352,) had extended over *all* the public lands of the United States in the Territory of Louisiana, to which the Indian title had been, or thereafter might be, extinguished, the powers vested by law in the Surveyor General. The act of March 3, 1811, (2 *Stat.* 665,) for the final adjustment of claims to lands, and for the sale of the public lands, in the Territories of Orleans and Louisiana, conferred on the President the same powers, in regard to the public lands of the Eastern District of the Territory of Orleans, as

previous laws had given him in regard to those in the Western District, and extended to the Western District all the provisions of those laws in relation to the sale of lands. It established land offices, and provided that they should be opened on certain days, for sale of all the public lands, with the exception of certain reserved lands, which should have been previously surveyed and the surveys thereof returned according to law; and for certain other lands that could not be surveyed in the ordinary way, and as should have been advertised for sale, with the approbation of the President. And then it provided (sec. 6) that, from and after a certain day, any tract that had been thus offered for sale and remained unsold, as well as any tract embraced by the provisions of the 3d section of the act (which embraces all the lands in the Eastern Land District of the Territory, and south and north of Red river, on the Western, "the sale of which is authorized by this section,") might be disposed of at private sale. Here is a "sale authorized by law," of lands, many of which were not surveyed, nor even ordered to be surveyed: and we have here a definition, given by the law itself, of the meaning of the phrase, "the sale of which is authorized by law. Here it is, "the sale of which is authorized by this section;" and the law declares that *it* authorizes the sale of them, by directing their survey at such times as the President shall deem proper, and their sale when he shall see fit to order it.

By the 8th, 9th, and 10th sections, the Surveyor General was required to cause to be surveyed such of the public lands in the Territory of Louisiana as the President should direct; a land office was established; and the President *thereby* authorized, whenever he should think proper, to cause so much of the land as should have been surveyed, to be offered for sale; and all such lands, certain reservations excepted, were to be offered for sale to the highest bidder. on such day or days as the President should by proclamation designate.

In the act of March 3, 1811, passed in lieu of that of February 15, but making, for the most parts, the same dispositions as to surveys and sales, we find again the expression, "the sale of which is authorized by this section," applied to lands yet to be surveyed, and to be sold, as well as surveyed, at the President's discretion. Also the expression, "also the lands sold by virtue of this section;" and, undoubtedly, a sale *by virtue* of a law, is a sale *authorized* by

it. How could it be "by virtue" *of* it, if not "authorized" *by* it? We find the true expressions in section 6, within five lines of each other.—(2 *Stat.*, 663.)

In the Territory of Louisiana, *no lands at all*, except private land claims, had then been surveyed. The public surveys had not yet commenced. This act provided for the survey of such of them as the President should direct, for the establishment of a land office for their sale, and for the sale of such as might have been surveyed, when the President should think proper. "The President of the United States be, and he *is hereby* authorized to direct," it said, such as might have been surveyed, to be offered for sale. If that *law* authorized him to *offer* them for sale, did it not authorize their sale? Certain specified reservations were made (sec. 10); and all the rest were to be sold to the highest bidder.

The act of 17th February, 1818, authorized the establishment of a land office at the seat of justice of the County of Arkansas, in what is now the State of Arkansas; which was to be opened whenever the President should think that land enough in the district had been surveyed to authorize it; and it provided, that when either should have been established, the President of the United States shall be, *and he is hereby authorized*," to direct the lands surveyed to be offered for sale, with certain reservations and exceptions. (3 *Stat.*, 406.)

By an act of 20th April, 1816, 3 *Stat.*, "the President," it was declared, "*is hereby authorized*" to cause a certain fort to be demolished, as soon as, in his opinion, the public interest would permit. Was not the destruction of that fort *authorized by law*, as soon as the act was in force, no matter how long the President might delay acting?

The act of April 24, 1820, (3 *Stat.*, 566,) which abolished the credit system upon sales of public lands, provided for *all future sales* of such lands, which were to be offered in all time thereafter, in quarter sections. It fixed the price of such lands permanently. It provided for surveying and subdividing them. In the 1st section it speaks of "all the public lands ot the United States, the sale of which *is* or *may be* authorized by law," because lands to which the Indian title was not extinguished, and reservations not then authorized to be sold, might become so subsequently by extinguishment of the Indian title, or repeal of the reservations.

But, in sections 4 and 5 we find the expressions, applied to *all* future sales, "any public sales hereby authorized;" and "the several public sales authorized by this act," applied as well to lands that might subsequently revert to the United States, as to any other: and the public sales spoken of have reference to the general provision, in section 3, that *at every public sale*, no matter when thereafter made, the highest bidder should be the purchaser. All such sales, through all coming time, were "authorized by this act;" were "further sales hereby authorized."

There cannot be a better definition of the meaning of the phrase than that which the law itself gives, in the act of 11th May, 1820, to annex certain lands to the District of Detroit. (3 *Stat.*, 577.) By it, *all* the public lands in the Territory of Michigan, to which the Indian title was extinguished on the 24th of September, 1819, were attached to and made part of the District of Detroit; and the second section provided, "That the lands aforesaid, to which the Indian title has been extinguished, and which have not been reserved or appropriated, by existing laws or treaties, shall be surveyed and offered for sale, under the direction of the President of the United States," with the exceptions specified, the sale of all these lands was then authorized by law.

These references need not be further extended. They leave no room for judicial interpretation. The Congress of the United States had plainly shown in what sense it used the phrase, "authorized by law," over and over again, and so plainly that he who ran could read, before the New Madrid act used it again.

At the date of that act, not a single foot of land in the Missouri Territory was authorized to be immediately sold. Not a foot had then been surveyed, with the exception of private claims. The first order of survey was given in *March*, 1815. No *sales* of lands in the Territory were proclaimed by the President until 1823.

On the 6th of March, 1816, the Commissioner of the General Land Office notified the Surveyor General at Chillicothe that the President had directed about one hundred townships to be surveyed, and prepared for sale, in the Territory of Missouri, in the vicinity of St. Louis; and informed him that the Register at St. Louis had advised as to the lands that ought to be first brought into market. Lands between the rivers Mississippi and Missouri had been directed to be surveyed into two hundred *townships;* and it

was now directed that they should be subdivided for sale.—*Instr. & Opin.*, 312.

According, therefore, to the notice of Mr. Commissioner Meigs, that sale was authorized by law; only of lands that the President had directed to be surveyed and prepared for sale, *there was not a foot of land in Missouri, when the New Madrid act passed, on which a New Madrid claim could be located.* That, of itself, is enough to show the absurdity of his opinion. For, to suppose that Congress meant what *he* supposed it did, is to impute to it gross ignorance or singular folly.

Moreover, the sale *could* no more be presently made, when the direction to survey was given, than when Congress authorized it to be given; and the sale was no more *authorized*, in either one or the other sense of the word, at one time than at the other. If the sale was authorized to be made, at any moment before it could be made in fact, it was authorized by the law, at its passage. Otherwise, it was not authorized until the moment came when the land officers could say to the public, "Come and buy! We are now ready to sell." Mr. Commissioner Meigs probably saw that it would not do to impute that meaning to the phrase, and so egregious a stupidity to Congress; because, under that construction, it was uncertain *when* a claim could be located; and so he planted him on a nonsensical middle-ground, for which he could find no warrant anywhere. He made a feeble attempt to give a reason, saying that the act of 3d March, 1811, directed that *certain* lands should be surveyed; that a land office should be established, and that the lands *so surveyed* should be offered for sale. *Wherefore*, he said, locations can be made only on the lands *directed* to be surveyed, for the purpose of being offered for sale at St. Louis.

His second letter shows that he meant directed by the President: and that being so, we fail to see the "wherefore." The act was not a temporary one; it directed the Surveyor General to survey such of the public lands as the President should direct *at any time* thereafter. For the disposal of any and all of these, a land office was established; and whenever any of the lands might be surveyed, the President "*is hereby authorized*," the act said, to direct it to be sold. He had directed certain lands to be surveyed, wh n Mr. Commissioner Meigs guessed at the meaning of the law. He might *never* order them to be sold. It was wholly for him to judge when it would be proper to do so. How,

then, according to the Commissioner's own notion, were they *then* authorized to be sold? They could not *be* sold, until the President ordered it. Was it that he was authorized to order it? How authorized? Was this because they had been directed to be surveyed? That direction was his own act. How did his own act *authorize* him to do another act? Was it because he *could* not order a sale, until he had first ordered, and then had, a survey? He *could* not order a survey, until Congress gave him the authority to do so. Then he was authorized to do it, and in due time to order a sale.

If the President was "authorized by law" to make sale of the lands directed to be surveyed, as soon as he had given the direction, it was because the phrase "authorized to sell" or "sale authorized" did not mean that he had authority and power to sell immediately, (which he did not have), but meant that he was then authorized to sell as soon as the land should be surveyed, proclaimed for sale and advertised. It could not mean that he would then *become* authorized, because if he was to *become* authorized after a time, he *was* not authorized at that prior time. Consequently it is demonstrated that he was authorized then, precisely as he was when the act passed, and no more so; authorized to order sale of all the lands in the Territory, when he should have had them surveyed. If ever the President has had other and further authority to order sale of lands in Missouri or Arkansas, he did not need it. The act of 1811 gave him that power, as to all the land in the whole Territory, and authorized the future sale of all without further legislation. If there had never been any subsequent law continuing the authority, all the sales ever made in either State would have been "sales authorized by the law" of 1811.

We pass to the fourth objection.

Louisiana was divided into the Territory of Orleans, and the District, afterwards called the Territory, of Louisiana, by act of 26th March, 1804.

And the Territory theretofore called Louisiana, was directed to be called Missouri, and its government provided for, by act of 4th June, 1812.

We have studied these acts with care, and are more at a loss than ever, to understand upon what ground, by what process of perverted logic, the Secretary of the Treasury, in 1818, arrived at the notion that the Territory of Missouri, as spoken of in the pre-emption act of 1814, was to be deemed

to consist of the organized counties only. It was *but* a notion, sustained by no reasoning, and by no other reason of policy even, than that any other construction would give rise to claims throughout the whole country, from the Mississippi to the Pacific ocean.

He said "Congress *could* not intend, in an indirect manner, to bring within the jurisdiction of the Territory, a set of men who had been declared by the Territorial authority to be without it." Why not? Was it necessary, in order for a region of country to be within the Territory, that it should be organized into a county? What law ever said so. By what right *could* the Territorial Legislature have undertaken to cut off from the Territory a vast extent of country, declared by Congress to be a part of it?

There was no warrant for saying that "The Territory of Missouri, within the meaning of the act of Congress, of 12th April, 1814, was the Territory, as organized into counties."

Construction! There was no construction of that act attempted by him. It provided for the confirmation of incomplete French and Spanish grants, to land, any where in the State of Louisiana and Territory of Missouri, any where in the Province of Louisiana, for the confirmation of donations "in said State or Territory," and for pre-emptions in "that part of the State of Louisiana, which composed the late Territory of Orleans, or in the Territory of Missouri," where the persons claiming had not removed from said State or Territory. By what right did the Secretary hold that the word "Territory of Missouri" had a narrower meaning in the 5th section, than in the 1st, 2d and 3d? If a claimant had removed beyond the limits of "the organized counties," would he have removed from the Territory, so as to lose his pre-emption?"

By the act of June 4, 1812, providing for the government of the Territory of Missouri, the whole country ceded by France, as Louisiana, except the Territory of Orleans, was not only to be *called* Missouri, but to be organized and administered. The Governor was, certainly, under Sec. 2, to see the laws faithfully executed throughout its whole extent; he and the Secretary could reside any-where in the Territory, and were not confined to the organized counties, under Sec. 9. Persons not residing in organized counties might hold offices of honor, trust or profit, and were entitled to vote at least for a Delegate to Congress; none of the rights guaranteed and secured by Sec. 14, were confined to those

only who lived in organized counties; and *all* the people of the Territory had the common right of using the navigable rivers in the Territory, secured by section 13. The White river, the Arkansas and the Ouachita, though running through no organized counties, were public highways, wherever in the Territory they ran. There is not a hint anywhere in the law, that the Governor, Secretary, Judges and General Officers of the militia were forbidden to exercise their powers outside of the limits of the organized counties.

The county of Arkansas was created by act of the Territorial Legislature of Missouri, passed December 1, 1813; and included all the country between New Madrid county and the Louisiana line: and, as we have seen, a Land Office for this county was established by act of 17th February; 1818. The counties of Pulaski, Clark and Hempstead were created immediately upon the organization of the government of the Territory of Arkansas, and these included all the lands their vague claim whereto the Quapaws had relinquished in 1818. In 1820, the Hot Springs were in the organized county of Clark; so that, if the notion of the Secretary of the Treasury had had anything of reason in it, there was no objection on that score, in 1820, to the location of the Langlois claim.

We come now to the fifth objection, raised by Mr. Attorney General Wirt in 1825, and again in 1826; i. e., that the phrase "the sale of which *is* authorized by law" required that the sale should have been authorized by law when the act of February 17, 1815, passed; and that as the lands that included the Hot Springs were at that time claimed by the Quapaws, and their title was not extinguished until August 24, 1818, New Madrid locations and preëmptions on such lands were void.

Undoubtedly the sale of those lands was not authorized by law at the date of that act. For the acts of Congress providing for the sale of the public lands always confined their action to lands to which the Indian title had been or might be extinguished. The act of March 3, 1811, section 8, (2 *Stat.* 665,) in providing that the Surveyor General should cause such of the public lands in the Territory of Louisiana, as the President should direct, to be surveyed, referred to the law in relation to the lands northwest of the Ohio, and above the mouth of Kentucky river. This reference was to the act of 13th May, 1796, (1 *Stat.*, 464,) by which the Surveyor General was directed to cause to be surveyed the lands to which

the title of the Indian tribes had been extinguished. But the reference is not to *this* provision of that act; nor is the Indian title mentioned in the act of 1812. Whenever it was extinguished thereafter, the power of the President to direct survey of the lands, to the survey and sale whereof no obstacle in the shape of Indian title was interposed, was plenary, without the need of further legislation.

For the eighth section provides, "That the Surveyor General shall cause *such of the public lands* in the Territory of Louisiana, *as the President of the United States shall direct*, to be surveyed and divided." They were to be surveyed and divided in the same manner as was provided by law in relation to the lands northwest of the Ohio, and under the same regulations and limitations *as to expenses*.

There was a subsequent proviso, forbidding the sale of lands, claims to which had been presented and filed; and there was no other limitation on the power of the President to order surveys, and upon survey to order sale, except in regard to lands reserved by section 10.

The act of 29th April, 1816, made it the duty of the Surveyor General, for whose appointment it provided, to cause so much of the lands of the United States in the Territories of Illinois and Missouri "as the President of the United States shall direct, and to which the titles of the Indian tribes *have been* extinguished," to be surveyed. (3 *Stat.*, 3.)

That the words "have been" were used in the sense of "shall," or "may have been," must be held, or else there never was *any* authority to survey the lands to which the Quapaw pretence of title was extinguished by treaty of August 24, 1818.

For, on the 17th of February, 1818, (3 *Stat.*, 406,) a land office was established for the county of Arkansas, for all the country between the Louisiana line (33°) and a due west line from the mouth of the St. Francis river; and general provisions were made for the survey and sale of the public lands in that district, without noticing the existence of any Indian title.

Nor, after the Quapaw title was extinguished, was there ever any provision by law for the sale of the lands which that tribe had claimed. They were *already* included in a land district; and when the Indian title disappeared, their survey and sale were proceeded with without any new authority given by law.

And when, by act of 5th April, 1826, lands *west* of this

district were added to it, it was provided (4 *Stat.*, 153) that nothing contained in the act should be construed as authorizing a survey on any lands the title whereof was *then* in any Indian tribe; the authority to survey those to which the Indian title had been extinguished being thus broadly recognized.

So the act of 2d March, 1827, (— Stat., —,) granting two townships of land to the Territory of Arkansas for the support of a university, provided for locating these lands in tracts of a section each, on any of the public lands in the territory to which Indian title had been extinguished, the legality of the prior survey of these lands being recognized.

We, therefore, on the most careful consideration of the whole question, submit that whenever a law authorized the President to direct, at such time as he might think fit, the survey of certain lands in a certain tract of country, and the sale of the same at such time as he should direct, the sale of all such lands, except so far as portions were reserved from sale, was authorized by law; and that if, at the time of the passage of the law, the Indian title was yet not extinguished to any portion of such lands, and the power to direct surveys said nothing about the Indian title, these also could be surveyed at any time after that title was extinguished; and at the moment of such extinguishment, if they were within a land district, they in nowise differed from the other of the lands, and their sale also was authorized by law: In other words, of all lands authorized to be surveyed and sold at the President's discretion, the sale was authorized by law; and the phrase really meant no more than, lands not reserved from sale or otherwise appropriated, of all that the President is authorized to cause to be prepared for sale and in due time thereafter sold.

Mr. Attorney General Legaré said, on the 1st of November, 1841: "It deserves to be remarked here—and the remark is one of which we are never to lose sight in discussing subjects connected with the land laws—that these laws, however local they may sometimes appear to be in particular provisions, constitute, in truth, one general system, characterized in the main by the same great outlines, and are, therefore, all to be taken as *in pari materiâ*."

In the case before him, the question was in regard to the country west of the Perdido. By the act of 1805 the powers of the surveyor of the public lands south of Tennessee were confined to the surveying of such lands in the Territory of

Orleans, as the President should expressly direct. Such also was the provision of the act of 3d March, 1811, sec. 8, in regard to the public lands in the Territory of Louisiana.

The act of 25th April, 1812, (2 *Stat.*, 713,) in regard to Louisiana east of the Mississippi, revived the grant of powers vested by law in the surveyor of public lands south of Tennessee, providing that they should extend over all the public lands in the said tract of country, without any reference to any direction from the President.

Mr. Wirt held that the power, having been granted to the President by the act of 1805, and not revoked by the subsequent affirmative statute, was still continued in him; and Mr. Legaré said that if it were necessary, he also would invoke the clause of the preceding statute.

But, he said, the act of 1805 contained a *restriction* on the surveyor, because a foreign Government claimed and held a part of the country in his district; but in 1812 that obstacle was removed; and after that he had the same authority there as elsewhere, under the original act of 1796. His powers and duties, he said, were, "to survey as soon and as perfectly as possible; to survey without waiting for the orders of any superior; to survey with a view to a speedy sale; at all events to survey." It is clear, he said, "That according to the whole scope and spirit of the act of 1796, if the Surveyor General is in any case whatever *not* to proceed forthwith to survey the public lands, *that case is an exception*, and the burden of proof is upon him that affirms it to exist, to show the special law by which it was created. (3 *Ops. of Attos. Gen.*, 705.)

All these powers and duties, he said, were, by the act of 1803, ascribed in express terms to the surveyor south of Tennessee. "Whenever, therefore, *his powers are extended over any new tract of country*, by virtue of an act of Congress, *the order to survey the public lands in it*, as soon as possible, with a view to speedy sale and improvement, is implicitly conveyed by the same statute."

The act of 29th April, 1816, authorized the Surveyor appointed by it, for Illinois and Missouri, to cause so much of the lands in those Territories to be surveyed as the President should direct, "and to which the titles of the Indian tribes have been extinguished."

The Quapaw claim then extended over the whole of the southern half of Arkansas, from Red river to the Arkansas. Before it was extinguished, the United States, by act of 17th

February, 1818, included the whole of that region in the district of the land office at Little Rock (itself then within the Quapaw claim) for the county of Arkansas, which included the whole country to the Louisiana line.

This act provided for no surveys. It authorized the President to sell any of the lands, in either of the districts, when a sufficient quantity should have been surveyed. The power to survey was unrestricted, and the moment the Indian title was effaced, it could be exercised, under the general provisions of the latter act, and of that of 1796.

The same opinion of Mr. Legaré thus describe the purposes of the land laws, and furnished a key for the solution of doubtful questions under them, which it would have been better for those to use who have been engaged for fifty years, by means of cavillation and *piepoudre* objections of strict construction, in defeating the intentions of Congress, and annihilating rights in thousands of cases. Unfortunately, the same vicious propensity to look upon every man who claims a tract of land by grant or pre-emption, as attempting to wrong and defraud the Government, is vigorous and mischievous yet:

"What were the powers of the Surveyor General in the Northwest, under the act of 1796? They were to carry into full effect the great scheme of disposing of the vast domain of the country, as soon as possible, with all the precision of a mathematical arrangement, with a view at once to accuracy in public accounts, *to facilitate sales*, to certainty in titles, and to the laying the foundations of that great social order which has since been built up in that wilderness, and the speediest improvement of the country and increase of population."

He was to survey, without waiting for orders, with a view to a speedy sale. If, in any case, he was not do it, that case was an exception. Whenever his powers were extended over a new country, the order to survey it as soon as possible was *implied*.

In July, 1820, there was no reason why that part of Arkansas south of Red river should *not* be surveyed, or why an order from the President to survey it was necessary. If it was not *then* authorized to be surveyed, it never was, for no law ever directed it specially after the treaty of 1818; nor can we find any order or directions particularly referring to it and giving authority to survey it.

If there was authority to survey it, after the law of 1818

passed, there was authority to sell it. Mr. Legaré said, in the same opinion: "I am of opinion that Congress did *authorize* the President to proclaim these lands, because it authorized and enjoined the preparing them for sale." Of course, then, the sale of the lands, no matter how long it might be delayed, was *then* authorized by law. The law, he said, authorized the land to be surveyed—the first great step to sale. It established land offices, and authorized the appointment of a Register and Receiver—*a second step, never taken but with a view to sale.*

Of cases decided by what may be aptly enough termed departmental and bureau law, there is too generally reason to say, "*Voluntate judicum magis, quam legitimâ auctoritate lites dirimebantur.*" It is refreshing to read the earnest and wise words of a man like Legaré, who was not a case-lawyer or a statute-lawyer, but *magister jurisque peritus; vir illustris et facundissimus, inclytæ recordationis; similiter eloquentiæ et legitimæ scientiæ artibus decoratus.*

He sees the difficulties in the way to a great and true decision, interposed by the sticklers for strict construction and the microscopic mode of argumentation; and he admits them, and that the questions are difficult; but how truly it can be said of him, in the words of Pliny; *Quid est quod non statim sciat? et tamen plerumque hæsitat: dubitat diversitate rationum quas acri magnoque judicio ab origine causisque primis repetit, discernit, expendit.*"

There is a striking contrast between his views, eminently worthy of the law officer of a great government, and the microscopic scrutiny of the word *is* by his predecessor. "Is authorized by law!" we seem to hear the latter soliloquize; "the sacred rules of strict construction and the reluctance of the United States to part with their lands, compel me to confine this word *is* to a present meaning. It will be too bold a construction to hold that it means anything else than *is now.* True, upon that limitation of its meaning, *there is not,* under other constructions that have, for the time, all the force and effect of law, and which I have sanctioned, *a single foot of land in the Missouri Territory,* on which a New Madrid claim can be located; *and never will be.* But far better thus *annul* a grant, and defeat an act of generous beneficence, than admit the possibility that it could be good grammar to say, 'may then sell whatever land *is* then surveyed, or *has* then been surveyed,' or use any similarly barbaric expression. Clearly Congress cannot be permitted to continue the

practice of so violating the rules of grammar. It must hereafter carefully say: 'may sell any land that shall then have been surveyed,' or, 'the sale of which shall then be (or have been) authorized by law.'

That there was no conceivable reason why a party should not be permitted, in 1820 or 1825, to locate with any claim, lands the sale of which might *then* be authorized by law, as well as those the sale of which had been authorized ten years before; and that, on the contrary, the policy of the Government and the interest of the country made it preferable, in order that the newly acquired possessions of the United States might be speedily brought within the domain of civilization, seems never to have occurred to Mr. Attorney General Wirt. He fixed his regards on the word *is*, and never looked beyond it.

And the same decision was made twenty-six years afterwards, by a Secretary of the Interior; and upon it, in part, the decisions of a former Secretary and of the Attorney General were overruled, and Rector denied a patent; while the same Secretary permitted a certificate of entry and purchase to be given to the holders of a fraudulent pre-emption claim, for the same lands; after he had decided that the reservation by the act of 1832 was not removed by the act of 1843; and in the face of the express disposition of that act of 1832, forbidding any *entry*, *location*, or appropriationof the same lands.

These are some of the beauties of departmental and bureau law and practice.

If we speak contemptuously of these decisions, it is because they deserve it. There is an immense distance between them and the Prætorian Edicts. A code made up of departmental decisions would hardly equal the code of Justinian. When the title to lands is denied for fifty years, by a decision that a student of the first year, one of those, *qui in primis legum vestibulis stantes, intrare ad arcana eorum properant*, would in after years be ashamed of, a moderate degree of indignation is just, and even laudable.

And when Mr. Secretary Stuart overruled the decision of Mr. Attorney General Johnson, Ulpian's words were again verified, *Neque enim utique melius pronuntiat, qui novissimus sententiam laturus est.* It was a case in which the later magistrate, instead of correcting the injustice or error of a master of the law, "*bene latam sententiam in pejus reformavit.*"

For the "stunted verbal interpretation" of Mr. Attorney

General Wirt, and Mr. Secretary of the Interior Stuart, had not a leg to stand upon. It was *famâ digna sinistrâ;* and yet it had a mighty power; and, perhaps, of all the powers of evil, none is more potent and more fatal than the misinterpretation of the laws. For here, error is injustice and ignorance a crime.

The same phrase, "the sale of which *is* authorized by law, occurred in the act of March 26, 1804, (2 Stat., 277), which authorized the sale, on direction by the President, of lands in the Indiana Territory, with certain specified exceptions; and section 10 then provided "that all the public lands of the United States, the sale of which is authorized by law, may, after they shall have been offered for sale to the highest bidder, in quarter sections, as hereinafter directed, be purchased, &c."

This law provided for surveying all of the lands north of the Ohio, and east of the Mississippi, to which the Indian title had been or should thereafter be extinguished, and the phrase "the sale of which is authorized by law" undeniably meant lands by any law of the United States authorized to be surveyed and sold, *at any future time;* for it was certainly applied to lands which not only *had* not been surveyed, but which might not be for many years, it being wholly uncertain when the Indian title would be extinguished. The very reading of the section shows the meaning so clearly that he who runs may read: "All public lands of the United States, the sale of which *is* authorized by law, *may*, after they *shall have been* offered for sale to the highest bidder, be purchased" at private sale.

The truth is, that the words *is*, *are*, *has been* and *have been* are constantly used in the statutes in a future sense. Thus, the act of April 29, 1816 (3 Stat., 330), gave a right of preemption to each person who "*is* settled on a portion of a section," &c.; and yet the very next section uses the expressions "*shall be* settled," and "*are* settled" as synonymous.

The ordinance of May 20, 1785, directs the Board of Treasury, &c., to return receipts, within 18 months to the Secretary at War, for all deeds which *have been* delivered; and as these deeds were to be executed and delivered after the passage of the act, and from time to time, the words *have been*, in the perfect tense, evidently meant *shall have been.*

In the act of March 3, 1803, regulating grants of land, &c., §6, (2 Stat., 230), we find, "and when it shall appear to the said commissioners that the claimant *is* entitled to a right of

pre-emption by virtue of the 3d section of this act," they are to certify to it, and that he *is* entitled to a patent. Was not '*then*' understood after '*is*'?

The act of March 2, 1805, Sec. 4 (2 *Stat.*, 326), uses the expression, "where lands *are* claimed," to mean where they *shall be* claimed before Commissioners; and it directs what the Commissioners shall do, when satisfied that the grant, warrant or order of survey *is* antedated or fraudulent. Yet one of these, made after the passage of the law, and antedated, would of course have been included.

The act of March 3, 1807, (2 *Stat.*, 441), provides that "no more land shall be granted by virtue of this section, than *is* actually claimed by the party." If a party had claimed 500 arpens, at the date of the passage of the law, but afterwards reduced his claim to 200, could the Commissioners have awarded him more than he *then* claimed?

The 2d section of the act of February 20, 1811, provides that, at any indefinite period thereafter, when any tracts of land shall have been sold, and not fully paid for, it shall be lawful to offer the same for sale, at the time and place of the sitting of the court for the county in which the land office *is* kept, for the district to which the tract *belongs*. Is it not plain that *is* and *belongs* had a future meaning.

So, in the act of March 3, 1811, Sec. 5, (2 *Stat.*, 663), we find the phrase. "Every person shall, within three years from the passage of this act, deliver a notice, &c., stating the situation and extent of the tract he *wishes* to purchase."

The phrase "*shall be* authorized to locate on any lands the sale of which *is* authorized by law," is of the same kind. The word *then*, or the words *at that time*, after *is*, are understood.

So in the 6th section of the same act, speaking of land directed by the act to be subsequently sold, it is enacted, that "any tract which *has been* thus offered for sale at public sale, and *remains* unsold, &c. Would Mr. Wirt have held that this meant lands that *had* been offered, and remained unsold, *at the time of the passage of the act?*

So, in the same section, the act speaks of a person who "*did* inhabit and cultivate *at the time of passing this act*, and still *continues* to inhabit and cultivate" at the time of making a subsequent application.

So, in Sec. 2, of the act of February 5, 1813, "where it shall appear that any person who *has* delivered his notice of claim, *is* entitled;" where *has* and *is* clearly have a future meaning, (2 *Stat.*, 797).

as to titles and claims to land in the Territory of Orleans and District of Louisiana. (2 *Stat.*, 329.)

And, as to the Indian title of the little squad of Quapaws living about the Post of Arkansas, and up the river Arkansas to the Pine Bluff, with a huge claim to a country in which now and then a few of them hunted, the Secretary of the Treasury, Mr. Gallatin, on the 2d of July, 1805, authorized the survey of the country, included in the Districts of Attakapas, Opelousas, Avoyelles, and Rapides, instructing the Surveyor General at Washington, Mississippi, to inform the white inhabitants, "and several small tribes of Indians who are scattered through that Territory," that the running of the lines was not to affect their rightful claims, and that the object was only to ascertain the vacant land, and to connect the whole together. (*Inst. & Opin.*, 794.)

Any one of these small tribes had as good a claim to that country, as the band of Quapaws had to the whole of that between the Arkansas and Red rivers, to a large part of which the Cados had a much better claim; and whose claim never having been extinguished, Mr. Wirt, if alive, ought to hold that the sale of these lands never *could* have been authorized by law. There were just as good Indian titles to all Missouri, until many years after 1815. On the 4th of August 1824, the Sac and Fox tribes ceded all the land in Missouri, between the Missouri and Mississippi Rivers; and on the same day, the Iowas ceded the same country. June 2d, 1825, the Great and Little Osages ceded all the land in Missouri and Arkansas. June 3d, 1825, the Kansas Nation ceded all the lands in Missouri. September 14th, 1829, the Delawares ceded their lands on James Fork, White River. October 24th, 1832, the Kickapoos ceded all the land in Missouri. October 27th, 1832, the Kaskaskia and Peoria tribes ceded all the land in Missouri. October 11th, 1842, the Sacs and Foxes ceded all lands west of the Mississippi.

Any single one of these Indian titles was entitled to possess and exert the same virtue in Missouri or in Arkansas, according as the claim was, as the Quapaw title, to prevent pre-emption and New Madrid locations; and the Osage claim a great deal more so; for the Quapaws were but a squad of that large tribe; and it did really claim and exercise rights against other Indians, over a large part of Arkansas.

And, notwithstanding the Quapaw title, it is a fact, that may easily be verified by the files of the office of the Surveyor General, now in the custody of the Auditor of Arkan

sas, that the public surveys were in process of execution south of the Arkansas river, preparatory to sale, *prior* to the treaty with the Quapaws.

The claim of the Quapaws, as defined by the treaty of Augnst 24, 1818, began at the mouth of the Arkansas river, ran up it to the Canadian, and up the Canadian to its source; thence south to Red river, which a south line would never have found, and down that river to the Raft, and thence by a direct line to the Mississippi river, thirty leagues in a straight line below the mouth of the Arkansas. The Canadian heads in the Rocky Mountains north of Santa Fe, and the Quapaws had about as much *title* to the vast country between the Arkansas and Canadian on the north, and Red river on the south, as the Ashantees had. A dozen powerful tribes ranged through that country, and the Quapaws were a little band, off-shoots of the Osages, whose hunting parties occasionally travelled through the eastern portion of that vast region. Arkansas had been settled by the French more than a century before it became a Territory, and no regard whatever was paid to the Quapaw *title*, except so far as the Spanish laws protected their possession of their arable and pasture grounds around their villages. A hundred years' possession by the French and Spaniards, with actual occupancy, of the country south of the Arkansas, had extinguished the Indian title; and the decision that, because their title was not formally extinguished by treaty until 1818, no one had a right to settle, or could obtain a pre-emption, or locate a claim, in all that immense region that lay between the Mississippi and Rocky Mountains, on the east and west, and the Arkansas and Canadian on the north, and Red river and the line of the present State of Louisiana on the south, was the most ridiculous absurdity imaginable.

So much of it as is now within the limits of the State of Arkansas was made a land district more than five months before the treaty. All of it that lay on the plains was the hunting and camping grounds of the Comanches or Neum; and the Wichitas or Ta-wai-hash lived on and owned all of it that lay between Red river and the Fansse Ouachita, for a great distance up those rivers; while the Cados or Cadohadachos or Nas-o-wit had a better claim to the country from the Caddo river to Red river, than the Quapaws, who, indeed, had none at all.

The United States had never recognized this country, except immediately on the Arkansas, from the Pine Bluff to

its mouth, as belonging to the Quapaws, and had never guaranteed it to them by any treaty whatever.

Nevertheless, if Congress chose to do so, it had the right to withhold the whole of this country from sale, just as it had a right to disregard all Indian claims to the country west of Arkansas, when it authorized the President to sell it to any Indians east of the Mississippi.

Nor is it to be supposed that so much of that country as is now a part of Arkansas, was an unsettled region in 1815. On the contrary, it contained a large French population, whose descendants still remain. The French and Spanish Governments had granted lands in it; among the rest, Point Chicot, or the Island of Chicot, on the Mississippi, to De Vilemont. All over it were white men settled with their families. The Hot Springs were well known, and even the Indians from the east side of the river visited them. The Creek Chief, Roley McIntosh, or Atus Micco, was there in 1809; and persons have died within a few years, who lived in Clark and Hempstead counties before the war of 1812.

There was no imaginable reason why locations of New Madrid claims should not be permitted to be made in that country, at any rate as soon as the pretended Quapaw title was extinguished.

In the opinion of Mr. Attorney General *Cushing*, in regard to the claims to these Springs, he said: "Many years ago it was ruled, by Mr. Wirt, that words in an act of Congress authorizing pre-emption of lands, 'the sale of which is authorized by law,' excluded the right of pre-emption from all lands, the sale of which had not been authorized by law *at the date of the pre-emption act.* Mr. Wirt's decision was right in the given case; but the reason was unsound, at least if intended as affirming that, as a general proposition, the words in an act, 'the sale of which *is* authorized by law,' confine the inquiry to the question, whether the sale was authorized or not *at the date of the act.*

"I do not entertain the least doubt that a New Madrid location, made on lands the sale of which was authorized at the time of the location, would be a good location, whatever might have been the condition of the lands at the time of the New Madrid act."

In general doctrine, he said, the word *is* had reference, not to the date of the law, but to the date of the thing to be done under it. The decision of the Supreme Court in *Barry* vs. *Gamble*, 3 *Howard*, 32, 54, was that a New Madrid

location might be made on lands not surveyed or proclaimed; and the act of 1843 removed all difficulty arising from occupancy of the Indians.

When Matthew Cunningham, in 1838, applied to enter a quarter section of land that was part of the town of Little Rock, he was confronted by the New Madrid claims of Peter Porier and Eloi Dejarlois, which were located in 1820, the Quapaw title to the land having been extinguished in 1818; and the reply to his application by the Commissioner of the General Land Office, on the 1st of February, 1838, was, that the tract was located by these claims, and that the act of March 2, 1827, *had confirmed the locations.*

They were illegal, on account of excess of quantity, which was the only defect *intended* to be cured by that act. And it followed that, in February, 1838, that officer considered that the objection of the existence of the Quapaw title in 1815 was no longer tenable; but was removed by the act of 1827, the general words used in that act including all locations, as, indeed, in terms, they did; and if that *was* the case, the location of the Langlois claim was then also confirmed.

The Commissioner said that, as these locations were only *voidable* and not *void*, on the 25th of December, 1824, Cunningham could not then legally enter the land with a Cherokee pre-emption; *i. e.*, that the removal in 1827 of the objection of excess of quantity, would relate, so as to make the location valid *ab initio*, and cut out an intervening location of a pre-emption. If so, it would have equally passed around and to the rear of a reservation of the same land from sale or entry.

On appeal to the Attorney General, that magistrate decided on the 5th of April, 1838, that the act of 1827 did confirm the locations, and as Cunningham had not then taken the necessary steps to complete his entry, the rights of the New Madrid claimants became fixed as against him.

In that case Cunningham applied for a hearing of his claim, after the impediments in his way should have been removed; and the Attorney General decided against him, because he *had* not done acts which he *could* not do, until after the department should have annulled the New Madrid claims which they then held valid. That has been the approved mode of destroying rights, by the administration of department law. The Supreme Court, in *Cunningham* v.

Ashley & Beebe, 14 *Howard*, 377, nevertheless decreed his claim valid, and gave him the land.

On the 11th of June, 1838, the Commissioner of the General Land Office reiterated his decision, that the New Madrid locations were cured by the act of 1827. That act provided, "That the location of lands heretofore made according to law," by virtue of warrants issued under the New Madrid act, not exceeding 640 acres in the whole, to any one sufferer, should be perfected into grants in the manner prescribed by that act, any construction thereof to the contrary notwithstanding.

And, as the *only* objection then remaining to the Langlois location, was the untenable and ridiculous one that the Quapaw title had not been extinguished in 1815, the act of 1827, *did*, in express terms, confirm it. It was a location "heretofore made according to law." If there was, at any time, any valid objection to it, all, valid and invalid, had been cured; and therefore, since the act of 1827, at any rate, the perfect title to the Hot Springs has been unjustly withheld from Rector upon a wretched quibble.

We have shown, we think, beyond possibility of doubt:

1st. That the objection that the location was invalid, because made in a square, and before any survey of the public lands adjoining, was cured in 1822; *if it ever was really an objection.*

2d. That locations of New Madrid claims were *not* confined to lands which had been directed to be prepared for sale at St. Louis or any where else; because the sale of all lands was authorized by law that were included in land districts, and were not covered by Indian title, or reserved from sale by law.

3d. That lands south of the Arkansas, whether organized into counties or not, were, as part of the Territory of Missouri, subject to be located by New Madrid claims.

4th. That the expression "the sale of which *is* authorized by law" did not mean, in the New Madrid act, lands the sale of which was authorized by law at the date of its passage; but those the sale of which might be authorized by law at the time of location.

And we have proven that the claim *was* located, in accordance with law, in 1820, by a valid survey, made by a deputy surveyor, duly returned by him and registered; and not recorded as a valid location, and plat and notice sent to the

Recorder of Land Titles, for the sole reason that, without lawful right or reason, the Secretary of the Treasury, through the Commissioner of the General Land Office, had made it his duty to treat the location as invalid.

And, moreover, in regard to the objection of *inactivity* on the part of Rector and Hammond, and of Rector and his son, in not presenting their claim for a patent; it is to be added that the General Land Office would not patent a New Madrid location, not made in conformity to the lines of the pulic surveys, until after the adjacent lands had been surveyed in accordance with the general system, and that, after the survey of 1838 and the filing of the plat in the Recorder's office, and issuance by that officer of his certificate, patent was refused on the ground that the surveys of the adjacent lands were not yet returned. But the other impediment was utterly insurmountable, even had this arbitrary rule not been adopted; and one was as little warranted by the law, as the other.

The sixth question alone remains, as to the effect of the act of 1843 on the reservation directed by the act of 1832. It had no other effect on the Langlois claim than to remove or attempt to remove an illegal obstacle; performing in that the same office as the acts of 1822 and 1827 did. It did not, in our case, make good what was before defective, but enabled us, if it had been allowed to have its just effect, to assert and maintain a title always good, by removing impediments erroneously interposed.

We have already said that we should prove that there never was any valid objection to the Langlois location, from the beginning. Now we propose to do so; and we beg the attentive consideration of the court.

We aver and will maintain that so far from the location being in any respect unlawful or improper, or liable to any just and legal objection, or contrary to the intention and purpose of the law of 1815, it was made precisely as that law intended such locations to be made, in the manner intended, and on lands in the condition in which the law meant they should be subject to location by such claims. The law intended precisely such locations. The Treasury Department and General Land Office, and Attorney General set them-

selves in opposition to the law; and endeavored to annul them all. The men who, representing Missouri, had the act of 1815 passed, some one of whom prepared it, knew the condition of the Territory and of the land and land-titles in the Territory. It is plain that these officers of the Executive Department knew nothing about it, and were blundering in the dark. When the same representatives of Missouri, in 1822 and 1827, obtained the passage of laws to sweep away the petty obstacles interposed by want of knowledge, and thought they had effected it, they found the same objections and others like them still adhered to, and their efforts still thwarted; and finally the *vis inertiæ* of steady and stolid objection and recalcitration proved the stronger, and the Legislature retired, foiled and worsted, from the field.

This is not fanciful nor imaginary, nor exaggerated. It is the simple truth of history.

In 1815 no land was held, in all the country that now constitutes the States of Missouri and Arkansas, by any other title than French or Spanish grants, perfect or imperfect, confirmed or unconfirmed. There had been no sale of an acre of land by the United States. There had been no survey of an acre upon the plan of or as a part of the public rectangular surveys. On the 17th of February no such survey had even been directed. The first order of survey, from the Treasury Department or General Land Office, was in March, 1815. In any sense of the phrase, except that which we give it, of not reserved from sale, or not *forbidden* to be sold, there was not a foot of land, the sale of which was authorized by law when the New Madrid act passed.

The French and Spanish grants were of all shapes and sizes, and some of them of immense extent. The Winter claims, in the vicinity of the Post of Arkansas, covered millions of acres. The De Vilemont claim covered Point Chicot, in the country south of the Arkansas. The Valliere claim covered millions of acres, on White river, from the mouth of Buffalo Fork to the head of White river, many miles in width on each side of the river. There were many claims on the St. Francis river, in Arkansas, and on the Mississippi, and the Delassus claim covered a large body of land below St. Louis.

All the persons whose lands were injured by earthquake, held them by such grants, with a front on the river, or bayou, and running back for quantity. *The purpose of the law was*

to give each a like tract elsewhere. There were no public surveys, by whose lines they could be governed in making the locations. Therefore, each was authorized to go to the Principal Deputy Surveyor and have the quantity to which he was entitled surveyed wherever he chose, and in whatever shape he might choose, with a river or crooked creek for one boundary, if it suited him; and he would, upon the plat and notes of survey, obtain precisely such a patent as was given for lands held by Spanish grant, surveyed in the same capricious manner, and in every conceivable shape. There was no *policy* to prevent this. It is worse than nonsense to talk about the purpose of Congress that the lines of the public surveys should be observed. There were no such lines; there were no such surveys.

Nor did Congress care in what *part* of the wide territory the locations were made. The more remote from St. Louis, the less valuable the lands were. The policy of the Government was to encourage the pioneer to open ways into the wilderness, and it set little value on lands west of the Mississippi, and cared less about regularity of surveys, where the rectangular system would be continually broken into by irregularly shaped tracts, of smaller or larger extent.

As Congress did not expect the parties to whom it offered benefits, to wait until the public surveys should have been made over a portion of the country, before they should be allowed to give up their injured land, and take land elsewhere in lieu of it, so neither did it mean by the phrase "land, the sale of which is authorized by law," either land that had been *offered* at public sale, and which consequently one could purchase at private sale; nor land that the President had directed or might direct, by proclamation, to be offered for sale; nor land surveyed and ready to be offered for sale, nor even land ordered to be surveyed that it *might* be directed to be sold; but simply land, the sale of which was not *contrary* to the law, and which the law authorized to be at the time surveyed and sold.

For if it did not mean just this, and no more—if it meant either of the others, there was not a foot of land in Missouri Territory, the sale of which was authorized by law, until 1823. There is no middle ground between the two meanings—land which a man can go *now*, at this moment, and buy at private sale at Government price, at the Government Land Office, or land which is by law the subject of sale,

is not forbidden to be sold, and *may* be surveyed and sold. Whenever a court has halted part-way between these two meanings, and tried to find some intermediate point at which the sale of lands which one could not as yet purchase, was "authorized by law," it has but guessed at random, without being able to give, or even attempting to give, a reason for its conclusion. It never occurred to the officers of the executive departments, in their wanderings in search of the meaning of the phrase, that when the act of the 18th May, 1796, used the phrases "the lands *by this act directed* to be sold," "townships which by the said ordinance are *directed* to be sold," "nothing in this act shall *authorize* the sale," "the President of the United States is *hereby* authorized to grant a patent;" and the act of 10th May, 1800, the phrases "*directed to be* sold by the act" of 1796, "*hereby directed* to be sold," "by the above mentioned act directed to be sold," &c., &c., they *settled* the meaning of the phrase, "sale of which is authorized by law;" and that the *authorization* was "*by law*," and contained in the words "shall sell," "may sell," "shall be offered for sale at public vendue," in the same acts; and that *those acts* "authorized the sale" of *all* lands which they did not declare reserved for the *future* disposal of the United States.

The New Madrid act of 1815 does not contain one single word in relation to the lines or subdivisions of the public surveys. It provides for special surveys, *in every case*, by the Principal Deputy Surveyor. The men who prepared the bill knew that no public surveys had as yet been made, or even ordered to be made, in the Territory, and they prescribed the same mode and routine as had again and again been prescribed in regard to French and Spanish grants, and to pre-emptions of back lands, by the acts of 1807, 1811 and 1814.

What the *location* of a claim or right was, was defined by Sec. 8 of the act of 2d March, 1805, (2 *Stat.*, 324,) which provided that the *location* of lands authorized to be made by General Lafayette, should be made with the Register or Registers of the Land Offices, and the surveys thereof be executed under the authority of the surveyor; and patent issue on presentation of the surveys to the Secretary of the Treasury.

The principal deputy surveyors provided for by act of 21 April, 1806, for the two districts of the Territory of Orleans, (2 *Stat.* 395,) were to execute all surveys authorized by law,

or required by the Commissioners, and to *file* and *record* all such surveys, and form, as far as practicable, connected draughts of the lands granted in the district, so as to exhibit the lands remaining vacant.

By act of 3d March, 1807, (2 *Stat.*, 441,) upon the confirmation certificate of the commissioners being filed with the proper Register or Recorder, and a *plat* of the tract therein designated being previously filed with him or transmitted to him by the Surveyor General, the Register or Recorder was to issue a certificate on which patent was to be issued. The Surveyor General, or officer acting as such, was required to transmit general and particular plats of all tracts of granted lands so surveyed, to the proper register or recorder, and also to the Secretary of the Treasury. The Register or Recorder had no power to examine, pass upon, revise or approve the surveys.

The act of 3d March, 1811, (2 *Stat.* 663,) Sec. 5, gave the right of preference in buying back lands, to the owner by grant of land on a river. These back tracts the deputy surveyor was authorized to cause to be surveyed. The party proceeded by filing a notice in writing with the proper Register, stating the situation and extent of the tract he wished to purchase; *and the time of delivering this notice*, it was provided, *should be considered as the date of the purchase.*

By this same act, the mode of surveying was authorized to be changed in the Territory of Orleans, in each district, as to lands adjacent to rivers, &c., and there to be laid out into tracts 58 poles in front and 465 in depth.

By the act of 12th April, 1814, (3 *Stat.* 121,) where claims confirmed by it had not been surveyed according to law, the Register or Recorder of Land Titles was required to make out for the principal deputy surveyor an order of survey, giving a proper description of the tract and its connection with other tracts; and on the return to him of the *plat* of survey, or where an order of survey was not necessary, to grant his patent certificate.

The principal deputy surveyor was required, on receiving such order of survey, to cause the land to be surveyed, and to make return of the surveys, *in separate plats*, to the Register or Recorder, and transmit plats also to the Surveyor General, copies whereof to be transmitted by him to the General Land Office. Of course the Recorder could not undertake to correct or pass upon these. They were final

or they would not have been sent to the General Land Office at the same time when sent to *him*.

The act of 18th April, 1814, (3 *Stat.*, 137,) provided that on a certificate of confirmation being delivered to the Principal Deputy Surveyor, he should survey the land and make general and particular plats of it, and return *these* with the original certificate, to the office of the proper Register, with like return of the plats to the General Land Office. The original certificates designated the lands. Immediately on receiving the plat, it was made the duty of the Register to issue patent certificate. And it was for the Commissioner of the General Land Office to determine whether the certificates corresponded with the plats returned by the surveyors.

In the New Madrid act the same mode of procedure was followed, except that, as the certificate of the Recorder designated no lands, but these were fixed and ascertained by the location and survey, the plat returned by the Surveyor General to the Recorder and to the General Land Office was accompanied with a notice "designating the tract or tracts thus located," and the name of the claimant.

It was deemed sufficient to say, in general words, "and upon such certificate being issued, and the location made, on the application of the claimant, by the Principal Deputy Surveyor, or under his direction, whose duty it shall be to cause a survey thereof [*i. e.* of the location] to be made," referring for the meaning of all this, and for details, without mention of them, to the former acts which we have cited.

The law, therefore, had no reference at all to the system of public rectangular surveys. These were already authorized to be departed from, on all rivers, lakes, creeks, bayous, &c. The plats of survey showed the vacant lands in the intervals between the granted tracts, and anywhere on these vacant lands (where not *reserved* from sale as having on them lead mines or salt springs) the New Madrid claimant could make his location, just as, originally, he located and procured survey of his French or Spanish grant. *There was not a word, or syllable, or a letter* in the law, or in any other law, to restrict or limit his right to choice, his fancy, or his taste.

And there was not a word, a syllable, or a letter that dictated to him in what *part* of the vast territory he should locate his claim. When the Commissioner went mousing around for objections, he found nothing in the law of 1815

to indicate an intention to confine the claimants to the organized counties in Missouri. He was looking carefully for reasons plausible enough to seem to justify him in preventing the confirmation of claims, (which has always been the chief end and religious duty of the General Land Office,) and he picked up *that* pretext. He might just as well have confined the right to locate to the city of St. Louis. It would be much better if the supposed *interests* of the Government were consulted less, and the beneficent intentions of Congress, and the honor and good faith of the country, more, in the construction and interpretation of the laws by more than *one* bureau of the Government.

The lands in Clark county, Arkansas, were just as open to the location of a New Madrid claim, in 1820, as those in the vicinity of St. Louis. Surveys had been made south of the Arkansas, without order from the President, under the general powers of the Surveyor General; and no sale was ordered by the President of *any* lands in the territory until 1823. Lands south of the Arkansas were ordered to be sold as soon as lands in the vicinity of St. Louis. The Commissioner of the General Land Office proposed to restrict locations to the organized counties, because, otherwise, people might locate their claims anywhere between the river Mississippi and the Pacific ocean. Well, suppose one had fancied a location on the summits of the Rocky Mountains, or out on the great plains of the Canadian. What interest had the United States to refuse him the indulgence of his fancy? *He* had to pay the expense of surveying.

If there was any land in the Territory of Missouri, on the 17th of February, 1815, on which a New Madrid claim could be lawfully located, it could be located on the Hot Springs of the Ouachita; for the Quapaw title to the country south of the Arkansas was no more thought of or cared for, then, than the Osage claim to all Missouri, and that of the Iowas and Sacs and Foxes to a great part of it. In 1820, at any rate, even that had disappeared, and the sale of the country, including the Hot Springs, was authorized by law.

Thus, 1st. It was never intended that these locations should conform to the lines of the public surveys, or be delayed until these surveys should be made; but that they should be located precisely like Spanish claims and preemptions to back lands.

2d. The *law* called the application for a survey, with des-

ignation of the land selected, a *location*; and never conferred any right or power on any Court to give that word any other definition; and the location of a New Madrid claim was complete, when the survey was made, and returned to the Surveyor General.

3d. These locations were *not* confined to land that had been directed to be surveyed. That decision no more authorized the sale, than the law authorizing the survey did.

4th. They were not confined to lands directed by the President to be sold. There were no such lands in Missouri Territory, in 1815 nor in 1820: and his direction that they should be offered at public sale, no more *authorized* their sale, than the previous act of Congress which gave him the authority to direct the sale, authorized such sale. The *law* authorized and directed the sale. It says so, in so many words, again and again. No court ever had a right to give the expression a meaning different from that in which the law itself used it.

5th. The idea that only lands in organized counties, or for sale in the St. Louis Land District, could be selected, was nonsense pure and simple, and an unauthorized interpolation into the law of a new and strange provision.

6th. The sale of the land selected under the Langlois claim, was authorized in 1820; and that was enough. The restrictive meaning imparted to the word "*is*" was simply ridiculous, grammatically absurd, and sustained by no reason, nor demanded by any exigency of public interest.

7th. The arguments and conclusions that have been based on the notion that an *exchange* of lands was intended, are fallacies, and at once exploded by the *fact* that the recorder required a relinquishment of the injured land, before he would furnish the evidence, by his certificate, of the right to select other land in lieu of it. The United States have had Langlois' land fifty-two years, and to this day have refused his representatives the land selected in lieu of it.

Thus this claim needed neither the act of 1822, nor that of 1827, nor that of 1843, to *cure* it, and make it valid. It needed the aid of each, only to dislodge and sweep away obstacles and objections illegally interposed, and to remedy perversions and misinterpretations of the law.

THE ACT OF MARCH 1, 1843.

This act (5 *Stat.*, 603) removed an objection illegally interposed more than twenty years before, to the issuance of a

patent on the Langlois location. Nobody can wink so hard as not to see, that although it speaks of *all* locations south of the Arkansas river, it had *special* reference to the Hot Springs, and was really a *special* and not a *general* law. It removes the same obstacle out of the way of the three claims to this land,—that of Rector, under the New Madrid location; that of Perciful, under the preëmption act of 1814; and that of Hale, under the Cherokee preëmption; and its evident and unmistakeable intention was to repeal or recall, as to each of these, the reservation declared by the act of April 20, 1832, and if either of these claims was valid, before and when that was declared, to cause it to be perfected into a grant. Any construction that prevents this, is an evasion of the law, eluding and avoiding its intention, subverting and abrogating it.

Mr. Cushing said, in his opinion, (6 *Ops. Attos. Gen.*, 700,) that the case of *Stoddard* v. *Chambers*, 2 *Howard*, 284, disposed of this claim, if there was no survey and location by Rector until after the passage of the act of 1832; but that otherwise it did not; for that was a case of a *location* made on lands reserved, and by no means decides that a valid location, made prior to the act of 1832, was expropriated by that act, or that it prevented the consummation of such previously acquired appropriation.

It is true, as Mr. Cushing said, (*Id.*, 703,) that the act of 1843 does not in the least degree affect this claim: For that act cured no defect but one, *i. e.*, the non-extinguishment, *at the time of the passage of the New Madrid act*, of the Indian title to the lands south of the Arkansas.

For this New Madrid claim was not located until after that Indian title was extinguished, wherefore the objection which had until 1843 prevented its perfection into title, was futile all the time, and no remedial act was really necessary to remove it.

But here was the trouble. The objection was that the Indian title was not extinguished on the 17th of February, 1815, and *therefore* the sale of the lands selected was *not* then authorized by law. That objection had been interposed, and it still barred Rector's way in 1843. If the act of 1832 had not been passed, still this objection was an absolute denial of Rector's right, an absolute bar to his obtaining a patent.

The Congress proposed to remove that bar—not that it

was a *valid* or *reasonable* objection, but that it was an objection which *in fact* prevented the perfection of the title of Rector. Of course, the moment it was removed he would have been entitled to a patent, if he established his location in 1820, because there was no other objection to that location. All the rest had been cured, or never amounted to anything.

Congress did not enact that locations made on lands "the sale of which was not authorized by law" at the time of location, or in 1815, should be perfected into grants. The question before it was, whether the existence of an Indian title, at the date of the New Madrid act, should continue to be an objection. It determined that it should not, and by enacting that locations of such lands should be perfected into grants, it decided that, but for the existence of such titles, the sale of the lands was authorized by law at the date of the treaty; or, that whether that was or was not so, the locations should be validated.

This law of 1843, then, does away with the objection that this sale was not *then* authorized by law, because the Indian title was not extinguished; and makes the location valid, unless the reserving act of 1832 prevents.

If it had removed, in this case, an objection that really applied to the case and was valid, then, *perhaps*, as the claim was, on account of that valid objection, not a valid claim prior to the act of 1843, that act would not have operated to annul the reservation.

But, as to *this* claim, the act of 1843 removed no valid objection, cured no actual defect. That the Indian title was not extinguished at the date of the New Madrid act, never was a valid objection, if it was extinguished before the location.

Wherefore, the act of 1843 did not *confirm* an invalid location, by curing a real defect, in this case; it did not give any new right or title or add any new or increased validity to the claim. It simply put aside an invalid objection, absurdly interposed by vicious construction and stunted, pedantic verbal interpretation. It simply said, "we will no longer withhold title and right, on a nonsensical objection, which a later Attorney General has exploded. The location was good, that objection to the contrary, and now we say so. That is all."

So that the reservation of 1832 was not recalled or set

aside by this act of 1843, so far as *this* claim is concerned. The latter act simply left the claim as it stood before that reservation, declining longer to rely on the only objection to it that existed at that time, and of which it was ashamed.

What *is* the *reservation* in the act of 1832? If the United States then *owned* this land, it could, of course, decline to sell it or allow it to be located with any grant or claim. A man may refuse to sell what is his own. If Rector's location had then been really invalid, the United States would still have owned the land, and it could have been *reserved* by them. But if the New Madrid location was really valid, and the only remaining objection to it was nonsense, the United States, not having it to sell, could not reserve it from sale.

Thus all depends on the *validity* of that only remaining objection. Surely we need not utter another word to show that it was at first and all the time a mistake of law strangely fallen into by an Attorney General, and a blunder in grammar; the misinterpretation of one little word, which yet was potent to do injustice for fifty years.

If it had been valid, the reservation would have been somewhat. Being invalid, the reservation was merely nothing, as to this 170.15 acres of the four sections. If it had been valid, the Act of 1843 would have cured it, confirmed the location and made it good, made that valid which before was nought. Being invalid, it was merely removed out of the way, the validity of the location before the reservation recognized, and an illegal bar to obtaining the title removed.

No matter what Congress *thought* or *intended*, if that was the *effect*. The members may have supposed the objection a valid one, and that to make the claims south of the Arkansas good, it must be cured, by the grace and liberality of the United States. But if it was *not* valid, *in fact*, the effect of the legislation was, in fact, no matter what Congress intended or understood it to be, merely to remove an obstacle unjustly and illegally imposed. It was not to *make good* a title, that the party might assert it; but to remove that which illegally prevented the assertion of a good title.

The act of 1832 provides that four sections of land, including the Hot Springs, *shall be reserved for the future disposal of the United States*, and shall not be *entered*, *located*, or *appropriated* for any other purpose whatever."

If the effect of the removal of the illegal obstacle inter-

posed by Mr. Wirt, is to enable Rector to assert his good title, there is neither *entry* nor *location* nor *appropriation* of the land. He does not enter it; he had located it twenty-three years before. It had been appropriated *then*, by the location.

But what is the meaning of the expression that land is *reserved* for the future disposal of the United States? Precisely that which is meant by an individual, who, owning an article of property, and not caring to part with it, says, *not binding himself by any promise or obligation to any one*,—says to *himself*, resolves, and declares that he will not sell the article until he may see fit to do so. He does not mean that a previous sale or a bargain for one shall be cancelled, but that he will make no new one. The United States do not declare an intention to disregard rights or equities existing, to annul entries or locations, or to destroy anything that has been done, but they merely declare that, until they shall see fit to do it, they will not sell, and that, because they will not sell, no one shall enter the land, nor take it by location of any floating claim or grant or right; nor shall any other than the same legislative power *appropriate* it for any purpose whatever.

Now it must be clear that a declaration like this *could* not stand in the way of the removal of an obstacle unjustly interposed, to prevent or delay the obtaining a patent upon a good and valid location made long before. Whether the act of 1843 was general or special, it unquestionably removed that obstacle as to *all* cases. None are excepted. The *effect* of the removal in a given case is another question.

So, the United States say, we will not at present sell these lands, and nobody shall enter or locate them. Afterwards they say, it shall no longer be an objection to any claim or location, that the Indian title was not extinguished in 1815. The obstacle never was valid, and the location of the lands *was* valid, and its perfection only prevented by this invalid objection. Can the prior determination not to sell nor permit entry or location for a time, destroy the validity of the prior location, by preventing, as to this land and location, the removal of the obstacle? And, if the obstacle *is* removed as to *it*, how can the determination not to sell, invalidate or prevent the grant of patent on a prior valid location, when the only objection has disappeared?

In the *United States* v. *Fitzgerald*, 15 *Peters*, 407, it was decided that no *reservation* or appropriation of a tract of land could be made, after a citizen had acquired a right to it under a pre emption law.

Congress, in 1843, knew of the existing reservation of the Hot Springs, as well as, in 1832, they knew, according to Mr. Cushing, that the land, including the springs, was unappropriated land, having no valid claim upon it. It did not occur to Mr. Cushing that, notwithstanding this knowledge, the act of 1843 did not except locations on lands that had been reserved from sale, nor the Hot Springs specifically, though it did except such as had been sold and appropriated. Here was a fit case in which to apply the rules, *exclusio unius*, *inclusio alterius*, and *expressio unius*, *exclusio alterius*; because here the reason that dictated them applies with all its force; for, if it was meant also to exclude locations on lands reserved, or one particular location, or a particular reservation, the same right to locate elsewhere should in justice have been given, and undoubtedly would have been given, as was given to those whose locations had been sold.

It follows that it is not *necessary* for us to argue the question, whether the objection removed by the act of 1843, being until then a *valid* one, its removal by that act ended or removed the reservation made by the act of 1832. For the objection was *not* valid, and it was the only one that had existed since 1822, to the location of the Langlois claim.

But as it is not improper to discuss it, and as our convictions in regard to the question are very clear, we propose to do so.

The act of 1843 provided that "*the locations heretofore made*" of *warrants* issued under the New Madrid act, upon lands south of the Arkansas river, if made in pursuance of that act in other respects (as that of the Langlois claim was,) should be *perfected into grants, in like manner as if the Indian title to such lands had been completely extinguished at the time of the passage of that act.*

The effect of this was to make, by relation, those locations valid, *ab initio*, precisely as if, in the very words of the law, there had never been any Indian title in the way. And this intention is even more clearly shown by the second section, which gave the claimant, in case his location had been sold, the right to enter a like quantity of land anywhere in Arkansas.

That is, the law virtually declared that the objection that the Indian title had not been extinguished at the passage of the New Madrid act, never was valid, if it had been extinguished when the location was made, and if, in that respect, as well as in all others, the location had been made in pursuance of law. Else, why *compensate* the claimant for the loss of lands sold by the Government, to which he had no title by a valid location?

No locations were excepted, saving those made on lands which had been *sold*. All others were *confirmed*, and to be *perfected* into grants, by relation, as if the objection had never existed. Now, to say that, notwithstanding this confirmation, of all locations except those upon lands that had since been sold, the declaration of

the Government made in 1832 that it would withhold the lands in question from sale, for its future disposal, and that they should not be entered, located, or appropriated, prevents the confirmation of this particular grant, is to say, either that Congress *could* not confirm it, or that, by the rules of interpretation of statutes, it must be deemed not to have *intended* to do so.

Of course it *could* do it. What, then, was the intention?

Undoubtedly a general provision of law authorizing pre-emptions or other privileged locations on the public lands does not attach to or cover an existing reservation. The reservation always declares that the land shall not be sold, entered, or located; and when a general pre-emption law or other similar general law is enacted, all reservations are, by implication, when not expressly, excepted.

The case of *The United States* v. *Gear*, 3 *Howard*, 120, is not in the least opposed to our opinion on this question. And Mr. Attorney General Cushing was right in saying that it did not sustain Mr. Secretary Stuart. The question before the Court in that case, as stated by the Court itself, was, "whether the section of an act, *in general terms*, to sell, (certain reservations excepted) without any reference to a previous act, which declared that lead mines in the Indiana Territory should be reserved for the future disposal of the United States, so far *repealed* the latter, that lead-mine lands in a part of that Territory were subject to sale like other lands.

Here was, first, an act reserving all lead-mine lands from sale, providing that they should *not* be sold. Then the same authority gives *general* authority to sell lands in the same Territory. There is a special act forbidding the sale of particular lands, and a subsequent act authorizing sales generally. The distinct question was, whether the general authority to sell repealed the special prohibition. There could be no doubt it did not. The maxim—

Specialia generalibus non derogantur,

is as old as the law itself.

But in the present case there is no question of the *repeal* of the former law. It forbade the sale, *entry*, *location*, or *appropriation* of the four sections in question. It is not contended that the act of 1843 either authorized its sale, entry, location, or appropriation, or itself appropriated any part of it. The reservation was, of course, subject to all just claims to any part of the lands. That is of course, because legislation is never held, if it can be helped, by the *Courts* at least, to be rascality; and because when the United States said, "We will not sell this land for a time, and no one shall enter, locate, or appropriate it," they did not add, "and we annul all legal or equitable claims to it." When A. says, "I will not sell my house or horse, and my agents shall not dispose

of either until I shall direct it," he cannot be considered or held, or *construed* to say, by implication, "and I repudiate all claims of title to it, and declare them null."

The question is not of *repeal*. The act of 1832 is not repealed. The question is, whether, when Congress removed the valid or invalid objection of the existence of the Indian title in 1815, and declared that the locations south of the Arkansas should be perfected into grants, precisely as if that title had not then existed, this did not reach back and confirm the location *ab initio*. If it did, then it was made to have been a good title by valid location, before the reservation, and that reservation did not apply to it any more than it would have done if the objection of Indian title had never been made or had never even existed.

If it did not, then intervening pre-emption claims would defeat it; and it could not be perfected into a grant, *in like manner* as if that title had never existed. If it did not, the effect of the act was to *make* a grant, and not to *perfect into grants* locations made twenty-five years before.

Every ratification retroacts, and is equivalent to a mandate. It makes the act of the agent to have been, *all the time*, *ab origine*, the act of the principal. It reaches back, and by relation cuts out intervening liens, incumbrances, and titles. Here the retroactivity is express. The locations are not made good *from henceforward*, but as though the Indian title had never existed, for the past as well as the future, and must be everywhere held to have been always good.

In *The United States* v. *Gear*, the act of 1807 reserved all lead mines from sale. The act of 1834, the Court said, at most, imparted an authority to the President to sell, given in the same way as it had been conferred upon him in other acts providing for the sale of the public lands—to sell, with certain specified exceptions, all the lands in certain districts.

The Court held that the special reservation in the act of 1807 was not repealed.

And these reasons for that decision were assigned:

1st. That the power to sell, in the act of 1834, was the usual, general power, given in general terms.

2d. That the repeal contended for would be the *repeal* of a settled policy of the Government, by an act for *a different and special purpose*, and such repeal limited in its operation to a few particular districts.

3d. That the special reservations in the act of 1834 were no more than a re-affirmation of particular provisions of prior statutes—limitations of a general power to sell, given by the act—and not to operate as an enlargement of the general power to sell lands, which, by law, the President never had power to sell, the sale of which has always been prohibited, and which never have been sold, except under a special statute.

That is, that it did not follow, because certain special reservations or exceptions were mentioned in the act of 1834, therefore there could be no others, even though made by prior laws, upon the maxim, *Expressio unius exclusio alterius est*—a maxim of a dangerous nature, and not of universal or even general application.

4th. That particular and special provisions of a prior law are not impliedly repealed by *general* provisions of a later law, containing only general terms.

Not one of these elements existed in the case of the Langlois claim. True, the act of 1832 contained a special reservation, which would not have been repealed or affected by a subsequent general law authorizing sales or granting preemptions; but special provisions of a prior law *will* be repealed by *special* provisions, though not by general ones, of a later law. The act of 1843 *is* a special one. It applied to particular cases, to certain locations, few in number, and readily ascertainable; and it was as directly referable to the Langlois claim as though it had named it.

Mr. Attorney General Cushing said (6 *Opin.*, 700) that the words "shall be reserved" did not necessarily imply any resuming, taking back, annulling, or repudiation of that which had before been lawfully entered, located, or appropriated. It would have been more fairly put, to have said that the words in question *could* not be made to imply any thing of the kind, because they mean nothing of the kind. He said: "We are not *bound* to suppose that Congress intended a violent invasion of a private right and interest, in any portion of the land described and lawfully acquired under previous laws; for such an act would be an *apparent* disregard of the Constitution of the United States."

That, too, is very delicately put. He should have said, as Lord Coke would have done: "We have no *right* to suppose any such thing; to impute any such villainous intention to Congress; for such an act would not only be an open violation and contempt of the Constitution, but such

an outrage upon private rights of property as can not be tolerated in any free government."

But the same learned magistrate well said that the case of *Stoddard* v. *Chambers* (2 Howard, 284,) did not dispose of this case, if there was a location by survey prior to 1832, for that that case was of a location made on lands then reserved, and did by no means decide that a valid prior location was annulled by the act of 1832, *or that that act prevented the consummation of the previously acquired appropriation.*

And he said, truly, that the act of 1832 shows that Congress understood the land of the Hot Springs to be unappropriated public domain. The presumption is so, in favor of the Legislature; for if it did not so understand, common honesty and decency required that the titles to it, though imperfect, should be respected. Of course it follows that Congress did not intend to strike down and destroy any claim whatever. It did not say so; and no officer of the Government ever had a right to say so for it. And this, we suppose, was what Mr. Cushing meant by saying that, as Congress had no reason to suppose that there was any valid claim to the Hot Springs, "So it may well be that Congress shall have passed an act which, *in terms*, is incompatible even with any previous inchoate appropriation of the Hot Springs." That is, the act *may* be so worded as to bear that construction, as Congress knew of no valid claims; but nevertheless, it must not be held to have been the intention to cut off and annul such claims, if any, unknown to it, existed.

But what this magistrate did broadly admit (p. 702) was this: *That if the non-extinguishment of the Indian title was the only flaw in this case, then the opinion of his predecessor, Mr. Attorney General Johnson, that Rector was entitled to the land by virtue of the act of* 1843, *was well founded.* Well, that was the only flaw, supposing it to have been a flaw at all—*i. e.*, supposing that the Indian title existing in 1815 made illegal the location in 1820. Even if it did, says Mr. Johnson, the act of 1843 confirms his claim to this land, notwithstanding the reservation.

And Mr. Cushing proceeds to say (p. 703) that the act of 1843 in nowise affects Rector, because he made his location after the Indian title was extinguished, and therefore, if he made it before 1832, there was no flaw or defect to cure, growing out of the Indian title.

But the act of 1843 did affect him, in a very great degree. The law officers and secretaries of the Government had held

against him, from 1825 to 1843, that his location was invalid, because the Indian title was not extinguished on the 17th of February, 1815. This objection had all the time prevented his perfecting his location into a grant. The act of 1843 swept away that objection—effaced it, annulled it, made it never to have existed, as to effect on his claim, and said, your location shall be perfected into a grant, *in like manner* as if the Indian title *had* been extinguished on the 17th of February, 1815.

But what Mr. Cushing there said, was upon the hypothesis that there was no location of the Langlois claim prior to the act of 1832.

The opinion of Mr. Attorney General Johnson will be found in Vol. V. of *Opinions*, pp. 236–237.

In 1841 Mr. Attorney General Legare considered the effect of the act of July 4, 1836, confirming claims to land in the State of Missouri (5 *Stat.*, 126,) and held that this act was "a legislative confirmation of all voidable locations made under any law of the United States, or sales by the United States, of any description whatever." He said: "I see no restriction or qualification in the act; and since its very object is, as I have shown, to give validity to these sales and locations, in spite of one fatal objection, (that the lands subject to these claims were not *in commercio*,) *I see no reason why it should not be interpreted as curing all other defects* which are susceptible of being cured by an act of Congress."

And he held that this act did cure defects in location of New Madrid claims, though made on lands not subject to sale—lands, for instance, not surveyed, or lands expressly reserved from sale. "In short," he said, "sales or locations which, under the general land laws, would be held void by the Executive department of the Government, are simply *voidable* in regard to Congress, and may, at any time, be rendered valid by its acts, *provided only*, as in the case before me, *it has done nothing that amounts to a complete alienation to others.*"

Wherefore he held such New Madrid locations valid against French or Spanish claims, confirmed by the act of 1863, although these New Madrid locations were upon lands that had been expressly reserved from sale by the act of 3d March, 1811.

Mr. Legare said: "The exception in the act of 1836, section 2, is of lands previously located under any law of the

United States, or surveyed or sold by the United States." (To these the confirmations were not to give title.) "In the act of 1824 the words are still more comprehensive. They cover all locations made, (to which there exists not some incurable objection, distinct from these claims. * * * * * *) and all sales susceptible of confirmation by an act of Congress." (The words of the act of May 26, 1824, were as to cases in which the confirmee was only to be allowed to enter *other* lands, "If, in any case, it should so happen that the lands, tenements, or heriditaments, decreed to any claimant, under the provisions of this act, *shall have been sold by the United States, or otherwise disposed of, or if the same shall have been heretofore located.* (4 *Stat.*, 52, § 11.)

"To say," Mr. Legare continued, "that this exception does not protect those whose locations cover the lands subject to the claims confirmed by these acts, because those lands had been reserved in the act of 1811, section 6, and were not subject to location or sale, is to make the exception a solecism in terms. It would be to except what was not excepted, which were absurd; and so the argument proves too much. If 'locations made under law' mean lawful locations, and 'sales' mean valid sales, there could be none such, according to this showing itself, on lands reserved by a permanent act from sale or location."

Here there was a law (of 1811) specially reserving from sale lands to which title was claimed by French or Spanish concession. The act of 1824 protects against such claims, lands that had previously been sold or otherwise disposed of, or located, and this, the Attorney General held, gave the locator title, though the land located by him was still, by the act of 1811, reserved from sale. Of course this was because the act of Congress *confirmed* the locations, and made them valid, by relation, as if the lands had never been reserved from sale.

UPON THE CLAIM OF JOHN C. HALE, UNDER THE PRETENDED PREEMPTION RIGHT OF JOHN PERCIFUL: ACT OF 1814.

This claim was never set up by John Perciful in his lifetime. After his death, and in 1843, his widow, Sarah Perciful, in her own right as widow, and for his heirs, undertook to establish his right to a pre-emption under the act of April 12, 1814, (3 *Stat.*, 121.) Under the fifth section of that act any person who had actually inhabited and cultivated a

tract of land lying in the Territory of Missouri, not rightfully claimed by any other person, and who had not removed from the Territory, was entitled to pre-emption in the purchase thereof. To cases under this law the regulations and provisions, restrictions and conditions of the act of February 5, 1813, giving pre-emptions in Illinois, were made applicable.

By the act thus referred to, (2 *Stat.*, 797.) the party claiming a pre-emption had to present it by giving a notice in writing to the register, designating the quarter section claimed; and his right to such pre-emption had to be made to appear to the satisfaction of the register *and* receiver. His entry had to be made at least two weeks before the time of the commencement of the public sales in the district where the land lay.

At the date of the act of 1814 the title or claim of the Quapaw Indians to the country in which the Hot Springs are had not been extinguished by treaty.

The Supreme Court said, in *Thredgill* v. *Pintard*, 12 *Howard*, 37, that no laws giving to settlers a right of pre-emption could be so construed as to embrace Indian lands. Such lands had always been prohibited from settlement and survey (the court said) by penal enactments. And this was said in regard to lands south of the Arkansas river, and to the Quapaw title to them.

If, therefore, Perciful *had actually inhabited and cultivated* the tract of land that includes the Hot Springs before the 12th of April, 1814, he could have had no right of pre-emption. It was an invalid claim, and the act of 1843 for the first time made such pre-emptions valid, as if the Indian title had not existed.

In 1820 it no longer existed. The location by Rector and Hammond was valid, and received no aid from the act of 1843, no additional validity, the only effect of that act being the removal (as to it) of an unfounded objection. It follows that, against it, valid originally, in 1820, the pre-emption claim under the act of 1814, not valid in 1814 or in 1820, could not be asserted by virtue of the act of 1843. The act of 1843 *could* not by operation *ex post facto* relate, and make the pre-emption valid from the beginning, so as to make invalid the New Madrid location, validly made in 1820. An act of Congress cannot have a retroactive effect upon one claim or title, so as to affect an intervening valid claim or title. We need not cite cases to establish that.

No doubt the meaning and intention of the act of 1843 was merely to remove, as to all claims coming within its purview, that is, all New Madrid locations and pre-emptions of 1814 south of the Arkansas river, the objection that the Quapaw title had not been extinguished. There is no doubt, in point of *fact*, that it was passed with especial, and, indeed, exclusive reference to the claims to the Hot Springs, and intended to remove that objection out of the way, wherever it existed, and let the different claims stand and combat each other on their merits. It was not intended that the reservation of 1832 should be in the way; but, of course, the *Salus Reipublicæ* always requires that the beneficent intentions and generous purposes of Congress (unless for the benefit of railroad corporations) shall be defeated.

But the New Madrid location was not helped by the act of 1843, *i. e.*, it was not made valid; no *valid* objection to it was removed; and therefore that act reached back and put out of the way for it an unlawful obstacle, an illegal and baseless objection, which had not invalidated it, but had merely prevented its ripening into a perfect title by express grant. It merely authorized that to be done which should have been done twenty years before, *i. e.*, a patent to issue on it; and it *could* not have that effect as to the invalid pre-emption, as against the New Madrid location. If it had intended that effect, it would have been retroactive to the prejudice of a vested right and valid title, and therefore void.

But it is unnecessary for the court to consider *these* questions, because, if the whole question of Indian title were out of the way, no right of pre-emption in Perciful ever *was* proven, or ever *can be* proven.

He, or those who after him asserted his claim, had to prove that he had "actually inhabited and cultivated" the quarter section including the Hot Springs, prior to April 12th, 1814; and he had to make this appear to the satisfaction of *both* the register *and* receiver.

Now, 1st: He never did "actually inhabit" the tract at all. The testimony on this point is so clearly stated and so well compared by the register, (William H. Etter,) one of the judices appointed by the law to decide the questions of fact, that we need only refer the court to his opinion, and say, that the testimony of Abner Highnight and Jacob Barkman, both of them worthy of entire credit, is positive and precise to the fact that Perciful never did live at or near the

Hot Springs, but on the Ouachita river, some miles away, and their statements are sustained at all points by that of Boune. The testimony of the other witnesses cannot shake theirs; because the others are not worthy of the same credit, and their testimony is, for the most part, vague and indefinite.

To *inhabit* a tract of land is, of course, to *live* and reside on it, and there have one's domicil; and, of course, to go away from it and have a dwelling and a home elsewhere, is to abandon it. *C'est va sans dire:* that follows and is a fact. One cannot inhabit two places at once. As far as the Department of the Interior can settle these questions, it has done so. It has held that one does not *inhabit* land unless he makes it his permanent home; that if he goes away from it and begins to build elsewhere, he abandons it; that it is not enough for him to be there *part* of the time, at nights, if he lives elsewhere, with his mother; that he must actually reside on it. See opinions and decisions at pp. 421, 2, 3, 4, 5, 6, 7, 8, 9 and 430 of 1 *Lester's Decisions and Land Laws;* and that "actual and continuous personal residence" is necessary, 2 *Id.*, 275.

See also 20 *Johns.*, 208; 8 *Wend.*, 140; 12 *Peters*, 319; 25 *Penn. St. Rep.*, 45; 11 *Id.*, 113; 11 *Serg. & Rawle*, 340; *Shields* v. *Walker*, 2 *Tenn*, 115; *Wyncoop* v. *Heath*, 10 *Watts*, 420; *Heath* v. *Biddell*, 9 *Barr*, 273.

When the claim of Perciful was first presented, in 1843, both the register and receiver decided that the claimant had failed to make out a case under the Act of 1814; and on this point, as well as on the others decided, the Commissioner of the General Land Office concurred with them.

Afterwards another opportunity was afforded the claimant, and, upon a full hearing and careful consideration, the register decided that inhabitancy was not proven, but, on the contrary, was disproven. The receiver thought it proven. Failing to make the fact appear to the satisfaction of both, the claimants had no longer a claim to assert. The decision was final, exactly as a judgment of affirmance is, when the Court is equally divided. It is not possible to open the inquiry again. There is final judgment on the facts, as conclusive forever as the verdict of a jury. Both officers not finding the evidence sufficient, on the second hearing, the *original* decision of their predecessors remained undisturbed. Whether it could have been reversed by a new finding, if both *had* agreed, we need not inquire; nor as to the power

of the Commissioner to open the case, not because he disagreed with the officers and his predecessor, as to the first finding, but to give the parties an opportunity to make further proof.

The register and receiver were constituted by the act a tribunal to determine the rights of those who claimed pre-emption under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final. *Lytle* v. *The State of Arkansas*, 22 *Howard*, 194; *Id.* 9 *Howard*, 333.

See also *Minnesota* v. *Bachelor*, 1 *Wallace*, 109; 16 *Howard*, 64 *Garland* v. *Wynn*, 20 *Howard*, 8.

When the Act of April, 1832, was passed, reserving the Hot Springs from sale, Perciful had no vested interest in the land that a court of justice could recognize. Then, the United States Government was the legal owner, and had the power to reserve it from sale; so that the offer to purchase, in 1851, and the assumed preference to entry claimed for Perciful, was inadmissible. Had the entry been allowed, in face of the Act of Congress, such proceeding would have been merely void. *Hale* v. *Gaines*, 22 *Howard*, 161.

ON THE PRETENDED PRE-EMPTION CLAIM OF THE HEIRS OF LUDOVICUS BELDING.

Upon the final investigation of this claim before the register and receiver, they agreed that Belding cultivated the land in 1829, and that he was in possession on the 29th of May, 1830; but the receiver's opinion was that he was the tenant of Perciful, not holding possession in his own right; while the register thought he held and cultivated in his own right.

The Commissioner, on the 26th of August, 1851, held that, as both officers had found that Belding did cultivate in 1829, the register was correct in holding that the rule that the tenant's possession is the possession of the landlord did not apply; and that though he obtained his possession by leasing from Perciful, the right of pre-emption inured to himself.

But it was not proven that Belding was in possession on the 29th of May, 1830. The facts proved before the regis-

ter and receiver were, that Belding leased from Perciful; that he lived on the premises in 1829, and cultivated a small piece of ground; but in February, or at any rate prior to the 29th of May, 1830, he in his turn leased to a third person and moved away altogether. That testimony is all now before this court. Then he was not in personal possession on the 29th of May, 1830. The fact that he left the springs in February, 1830, besides being proved by other witnesses, is broadly admitted by Mrs. Belding in her affidavit, made March 7th, 1839.

In June, 1838, Richard C. Hawkins, who is long since dead, made an affidavit in regard to Belding's possession of the Springs, and on the 27th of April, 1843, he testified in regard to it again, when the case was being re-examined under orders from the General Land Office. (*See Appendix Q.* 1 *and Q.* 2.)

He resided at the springs in 1829 or 1832; and his testimony was, that during the year 1829, and up to the month of February, in 1830, Belding lived at the springs, by virtue of a lease from Perciful, who then claimed them. He cultivated a little patch of ground, (mostly as a garden,) almost due north of the principal spring, and not less than one hundred and seventy-five yards from it. In the years 1829 and 1830, Perciful lived on his own farm on the Ouachita river, five or six miles from the springs.

Before May, 1830, Belding gave up his possession, leasing to Asa Thompson, and retaining no house there. This (he thinks) was as early as February. His mother-in-law still claimed to own a cabin there, to be used in case she should ever wish to return; but, with that exception, neither Belding nor any member of his family ever claimed possession of or right of possession to any tenement or other improvement after the first of the year 1830, and the witness never heard from Belding in his lifetime that he claimed any right of pre-emption to the springs.

Belding leased from Perciful in 1828, for five years. Early in 1830 he gave Thompson possession, under his lease, for the residue of the term; and about August, 1830, Hawkins bought of Thompson the unexpired term of the lease, it being for the years 1831 and 1832. About the 21st of August, 1830, Perciful, Belding, Thompson, and Hawkins met together, and by consent of all of them, and in presence of all of them, the lease from Perciful to Belding, and the sub-lease to Thompson, were cancelled and given up,

and Hawkins took a lease from Perciful, and secured payment of the rent to him. At the expiration of the term he re-delivered possession to him.

After the lease from Perciful had been cancelled, and the Pre-emption Act of 1830 had passed, Belding, on the 2d of April, 1831, executed and delivered a writing, by which he acknowledged and made known that he did lease from Perciful the buildings and improvements at the Hot Springs, and that he had leased the buildings and all the privileges except the cabins, two of which were not his, to Richard C. Hawkins, until January 1st, 1833, at which time he agreed and bound himself to deliver all and every part of the buildings and improvements at the Hot Springs that he then or ever had, in the same condition as Hawkins was to deliver to him, unto Perciful if he should demand the same; *and that he had no pretension to the improvements of said springs, except under the claim of Perciful.*

The handwriting of Belding to this was proven by Warren Dunham (who was then Judge of the County Court of the county,) who also testified that Belding acknowledged the execution of the instrument soon after its date. The handwriting was also proven by two other persons, and the instrument and affidavits were recorded on the 10th of January, 1842. (*See Appendix, Q.* 3.)

The Act of 29th May, 1830, (4 *Stat.*, 420,) gave pre-emptions to persons then in possession, and who cultivated any part of the tract in 1829, with a proviso that no entry or sale should be made under it of any land which had been reserved for the use of the United States or of a State. The 4th section repeated this provision in fuller terms, by providing that the right of pre-emption should not extend to any land that was reserved from sale by act of Congress or order of the President, or that had been appropriated for any purpose whatever.

The party claiming a pre-emption was to make proof and payment before the time of the sale of the lands including the tract claimed.

This act was to be in force one year.

On the 20th of April, 1832, the Hot Springs and five sections of land including them were reserved from sale, entry, and location. (4 *Stat.*, 505.)

And at the same session, on the 14th of July, persons occupying lands the surveys whereof had not been made and returned were to be permitted to enter the lands, on the

same conditions, in every respect, as were prescribed in the Act of 1830, within a year after the surveys should have been made. (4 *Stat.*, 603.)

And the Act of 1830 was revived and continued in force for two years, and no longer, by the Act of 19 June, 1834. (4 *Stat.*, 678.) It was again revived and continued in force for two years by the Act of 22d June, 1838, (5 *Stat.*, 251.) But it was expressly provided by that act that it should not be so construed as to give a right of pre-emption to any one to any land specially occupied or *reserved* for town lots, *or other purposes*, by authority of the United States.

It is certainly clear that one could not have the benefit, in 1839, of a pre-emption claim under the act of 1830, when he had abandoned the land, leased it for the unexpired term of his own lease, before the act of 1830 passed, and to which he never returned.

The sole effect of the act of 1832 was to confirm the right of pre-emption to lands the surveys whereof had not been made and returned, and some other specified lands, of which we need not speak, and to permit the party to prove his right and enter the lands, when they should have been surveyed and the surveys returned. It certainly intended that the party should still be in possession. Otherwise, if a person entitled to pre-emption under the act of 1830, had abandoned the lands, and another person took possession, cultivated in 1833, and was in possession on the 19th of June, 1834, the latter would have had no pre-emption, although one was expressly given him by the act of that date; and the person who had abandoned the land *would* have one, could purchase the land, and oust the party entitled to pre-emption under the act of 1834.

Indeed, it was held by the officers of the Government that the act of April, 1832, only helped those who had lived on land whereof the surveys had been commenced before the 29th of May, 1831, when the act of 1830 expired. (*Instr. & Opin.*, 567, 582, 587, 648.)

The only proper construction of the law, and the only one sustainable with due regard to public policy, is that the legislature never meant to grant pre-emptions to persons who should abandon the lands before proving their claims and purchasing; the pre-emption laws being passed for the benefit of indigent settlers, and not speculators. If not, what was the meaning of the provision of the act of 1830, revived by the act of 1834, that all assignments and transfers

of the right of pre-emption, prior to the issuance of the patent, should be void? The very moment a man voluntarily abandons a tract of public land, to which he has not proved a pre-emption, he abandons all claim to it. He cannot so act as to induce or *permit* another to settle on it, improve it, increase its value, gain a right of pre-emption under subsequent laws, and then he step forward, when the land becomes worth the fraud, set up his obsolete pre-emption, and rob the subsequent settler of the fruits of his labor. Continued possession *must* exist, or the right of pre-emption dies. In this case Belding left the land before the right of pre-emption was even created by law; and the claim of his heirs is not only absurd, but fraudulent. There could not be a stronger case for the application of the doctrine of equitable estoppel. And though the United States might not apply that doctrine, except in favor of an adverse claimant under a subsequent law, yet if then they would be bound to apply it, or if the courts would apply it in favor of some other claimant, there is no valid pre-emption in such a case, even against the United States.

On any other construction of the law the man might have abandoned the land claimed, and gone abroad, settled in Canada or Australia, and still been entitled to prove his pre-emption and buy the land, after its survey in 1838; and this he might do and at the same time prevent an actual settler, in possession, from securing the fruits of his labor, and possess himself of improvements in which neither his money nor his labor was invested. The law never meant to reward the abandoner of land, him who left it to become a thicket or a desert again, and to withhold its benefits from him, who, finding it thus vacant and deserted, hardly scarred perhaps by axe or plough, took possession, and settled on and improved it, and did all that the act of 1834 or 1838 required, to entitle him to a pre-emption.

It has been held that where one person holds possession of public land under another, as by lease or contract, he, the tenant, *actually* in possession, and not the other, is entitled to the pre-emption. We think that the law should clearly be so construed. But if so, in favor of Belding as tenant of Perciful, notwithstanding his express agreement made in 1831, not to claim any benefit of his improvement, then it must also be held that Thompson's possession on the 29th of May, 1830, was not *his* possession. The rule must apply against him as well as for him.

And, moreover, when Thompson obtained possession, he held under Perciful, and not under Belding. The possession of each was either his own possession (for the purposes of the pre-emption act,) in which case Belding had no such possession on the 29th of May, 1830, as the law required, and so could not claim a pre-emption; or else the possession of Thompson was, as that of Belding had been, the possession of Perciful. It was the possession of Perciful, the *original* landlord, which neither lessee nor sub-lessee could dispute. Belding *assigned* the unexpired term of the lease to Thompson. At its expiration he would have no right of possession. Immediately upon that Perciful would become entitled to it.

While Belding lived at the springs, he was simply a trespasser. The right of pre-emption was created, if at all, by a law enacted after he had *ceded* his possession and all his *right* to continued possession to another person, and made that person lessee of Perciful. Those who cultivated in 1829 obtained no right of pre-emption, unless they remained in possession at the date of the act. Nobody pretends that he was in possession then. The Attorney General properly decided, on the 29th of March, 1837, (3 *Opins. of Attys. Gen.*, 184,) that the law could not be so construed as to give a person who took possession of a tract of public land, and, before such possession had ripened into a pre-emption right, leased the tract to another, the benefit of the cultivation and possession of the latter. Such a lessee, he said, as between himself and the United States, is a mere trespasser, and has no authority to make a lease. The principles of law as to the lessee not being heard to dispute the lessor's title, and that the possession of the lessee is that of the lessor, were, he thought, inapplicable to cases under the pre-emption laws.

The decision of the register and receiver is only final and conclusive as to the *facts*. In Belding's case they did not find that he was in actual possession on the 29th of May, 1830. On the contrary they differed on the question whether, *not* being in actual possession, he was to be deemed, *in law*, in possession by the possession of Thompson as his tenant. That was a question of law, already decided by the Attorney General in 1837.

It is true that the heirs of Belding were permitted to pay the purchase money, and obtain a certificate for the land. But they did so upon the express condition that they were

not to apply for a patent upon it. It was not a certificate of *purchase*. It *could* not be, because the Act of 20th April, 1832, reserved the land from sale; and it was not *intended* to be. It was a gross blunder to permit the certificate to issue; and the use that was made of it afterwards was fraudulent. It was, in substance, only a certificate that they had been allowed to pay the purchase money; and the plea upon which it was obtained was that it was necessary, in order to put them upon an equal footing with the other claimants. But it was immediately used for the *real* purpose for which it was asked—that is, to harass the other claimants, withal, by suits for possession; it being, on its face, a sufficient title, under the laws of Arkansas, whereon to maintain ejectment.

It is quite certain, at any rate, that obtaining it in no way strengthened the claim. It was a fraud, like the claim itself; which was a fraud on the Government and a fraud on Perciful alike.

If the principles of the law of landlord and tenant do not apply to pre-emption cases, they do not apply in favor of Belding, any more than against him. And he was further prevented from claiming them, as against Perciful, to make Thompson's possession his own possession, by his obligation afterwards executed to Perciful. It was a fraud upon that agreement for his heirs to claim a pre-emption at all, and it was a fraud to obtain the certificate, because the officers of the Government were cajoled, misled and deceived, and induced to permit it to issue by false pretences as to the purposes for which it was desired.

Attorneys General Cushing and Bates held this claim invalid, and the former said that it seemed particularly unfortunate that entry by Belding was allowed. (6 *Opin.*, 710; 10 *Id*, 56.)

Mr. Secretary Thompson held that the entry was "against law, and should not have been allowed." Therefore he directed that it should be cancelled; upon which the heirs of Belding undertook to prevent cancellation by bill in Equity to enjoin the Secretary and the Commissioner of the General Land Office. The bill was dismissed, and on appeal to the Supreme Court the decree of dismissal was affirmed. (*Gaines* v. *Thompson*, 7 *Wallace*, 347.)

In *Wilcox* v. *Jackson*, 13 *Peters*, 498, it was held that whenever a tract of land had been appropriated for public use, it was severed from the public domain, and susequent laws of sale are not construed to embrace it, though they do not in terms except it.

And in *United States* v. *Gear*, 3 *Howard*, 120, it was held that the Pre-emption Acts of 1834 and 1838 did not extend to Lead Mines and Salt Springs, reserved for the future disposal of the United States by the Act of 1807, though they contained express exceptions and did not mention these among them.

Therefore the revival of the Act of 1830, in 1834 and 1838, did not remove the reservation *out of the way of the Belding claim.*

And, finally, even if he had had a valid pre-emption, the act of reservation would have annihilated and destroyed it. That was expressly settled in the case of *Frisbie* v. *Whitney*, 9 *Wallace*, 187. In that case, Whitney had settled on public land and made the improvement which entitled him to pre-emption. It had not been surveyed, and Congress afterwards authorized its entry by persons who had purchased under a claim to it which the Supreme Court had decided invalid. After this Whitney applied to make his declaration of intention to occupy and cultivate the land, and the Land officers refused to receive it. The Supreme Court, on full consideration, decided that it was in the power of Congress to grant land to one person, to which another had by law a right of pre-emption—that the law-making power could intervene, and by a new law withdraw the land from the operation of the pre-emption laws, so long as the right of preference in purchase remained unexercised and amounted to no more than this preference; there being, until the exercise of that right, no vested right in the land, to be affected.

In 1832 neither Perciful nor Belding (if either had *any* right in regard to the Hot Springs—which neither of them *did* have)—had anything more than merely such a right of preference. The lands were not surveyed. Neither of them had preferred a claim, or taken any sort of step to exercise his pretended right. In that year "the law-making power intervened, and by a new law" (still unrepealed) "withdrew the land from the operation of the pre-emption laws."

Of course, after this reservation, the issuing of the certificate of entry to Belding's heirs was a nullity. His pre-emption right was annulled. He had no longer, at any rate, a right to purchase the land at all, much less to purchase in preference to any other person or to all others.

And, unless Perciful or Hale, or the heirs of Belding, have "*title*," either legal or equitable, to the quarter section

that includes the Hot Springs, he or they have no right to be here in the Court of Claims by petition. It must be, not a mere right to preference in purchasing, but a *title*, either legal or equitable. Neither has had even such a right of preference, since the reservation; but if either had, that is no *title*. We need not define the word "*title*." Its meaning is too well known. The law that grants a right of pre-emption is but a mere *promise*, so long as the right is unexercised—a promise, that when the land is to be sold the party shall be entitled to purchase, in preference to others. This *promise* is not a *title*, either legal or equitable, to the whole or any part of the four sections of *land*, constituting what is known as the Hot Springs reservation. There is not even possession. If Perciful ever had possession, he never resided on the land, and he *did* reside elsewhere. He died nearly forty years ago, out of possession. Belding never had possession after February, 1830, forty-one years ago. What sort of equitable title could this promise, recalled and revoked by the act of reservation, give either of them, on which a bill in Equity for *legal* title can be maintained? In *Frisbie* v. *Whitney*, the Supreme Court expressly decided that one who has only a right of preference, unexercised, although he endeavors to exercise it, and permission to do so is denied by the officers of the Government, has no vested interest in the land," no vested right to it—no right at all as against the Government. The pre-emption acts, the Court said, adopting the language of Mr. Attorney General Cushing, "do not confer on the pre-emptor *in posse any right or claim* to be treated as the present *proprietor of the land*, in relation to the Government." And, adopting the language of Mr. Attorney General Speed, "The land continues subject to the absolute disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money." The heirs of Belding have not paid the purchase-money. They *could* not pay, because there was no one authorized to receive it. The land being reserved from sale or location, the payment was a mere idle act. The money remains still their own. The certificate was void *ab initio*, being granted in violation of law; and, moreover, has been cancelled. Moreover, neither Perciful nor Hale nor Belding paid the purchase-money, until long after the time within which, by law, it could be done, had elapsed.

Finally, the decisions of this court have now settled it

conclusively, that by the reservation act of 1832, the inchoate pre-emption rights of Perciful and of Belding, if they had any, were utterly destroyed; and they can, in no manner, enforce them in the courts.

JOHN B. SANBORN,
ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel for Rector.

Page 32, line 9 from top, after "*Mitchell* v. *The United States*," insert "9 *Peters*, 712."
Page 33, lines 10 and 11 from bottom, for the latin sentence read, "*omnia rite præsumuntur acta, donec probetur in contrarium.*"
Page 37, line 15 from bottom, for "charterlary," read "chartulary."
Page 38, line 17 from top, for "one," read "*our.*"
Page 40, line 14 from top, add 9 *Howard* 314.
Page 41, line 4 from top, for "*vite*" read "*rite.*"
Page 41, line 12 from top, fill blank with "5 *Cranch*, 241.
Page 41, line 13 from top, add "5 *Wheaton*, 293.
Page 46, line 4 from top, for "Government," read "question arose."
Page 46, line 17 from bottom, for "bound by," read "binding."
Page 47, line 8 from top, for "location," read "locate."
Page 47, line 18 from top, between "it" and "the" insert "not"
Page 48, line 7 from top, for "has," read "had."
Page 48, line 18 from top, for "not," read "no."
Page 53, line 14 from top, for "Ames," read "Cruise."
Page 53, line 21, from top, for "Sands," read "Lands."
Page 58, line 15 from bottom, for "make" read "mark."
Page 58, line 9 from bottom, for "*and*," read "*ad.*"
Page 59, lines 21 and 22 from top, for "free and defined," read "to fix and define."
Page 63, line 3 from bottom, for "Weid" read "Wirt."
Page 64, line 6 from top, for "further," read "public."
Page 64, line 4 from bottom, for "Kinley," read "McKinley."
Page 65, line 10 from bottom, for "laws," read "law's."
Page 66, line 16 from top, after "less," insert "have."
Page 66, line 22 from top, after "were," insert "really."
Page 68, line 10 from top, for "on" read "in."
Page 69, line 14 from top, for "there," read "these."
Page 70, line 13 from top, between "or" and "which," insert "to."
Page 70, line 11 from bottom, omit "not."
Page 70, line 14 from top, for "was," read "were."
Page 70, line 15 from top, for "its," read "their."
Page 71, line 3 from bottom, for "one," read "done."
Page 71, line 2 from bottom, for "becomes," read "become."
Page 72, lines 21 and 22 from top, for "bill," read "will."
Page 72, line 8 from bottom, for "same," read "sound."
Page 72, line 3 from bottom, between "as" and "the," insert "that."
Page 73, line 5 from top, for "created," read "located."
Page 73, line 22 from top, after "most," insert "part."
Page 75, line 19 from bottom, before "or," insert "were."
Page 76, line 19 from bottom, for "cavillatro," read "cavillatio."
Page 76, line 19 and 18 from bottom, for the latin sentence, read *ut ab evidenter veris per brevissimas mutationes disputatio ad ea quæ evidenter falsa sunt, perducatur.*
Page 78, line 2 from top, for "true," read "two."
Page 79, line 23 from top, for "United States, with," read "United States. With."
Page 80, line 3 from top, for "notice," read "notion."
Page 80, line 20 from bottom, for "him," read "himself."

Supreme Court of the United States.

No. 117.

WILLIAM H. GAINES, AND OTHERS,

vs.

JOHN C. HALE AND HENRY M. RECTOR.

BRIEF ON PLEA IN ABATEMENT.

JOHN B. SANBORN,
ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

WILLIAM H. GAINES, AND OTHERS,

vs.

JOHN C. HALE AND HENRY M. RECTOR.

ON PLEA IN ABATEMENT.

Rector pleads in abatement the institution of suits in the Court of Claims, upon their respective claims, under act of Congress of 12 June, 1870, asserting against the United States and each other their respective claims and titles as they are relied on in this suit, by all the parties here, and that these suits instituted prior to the judgment and decree below, in the Supreme Court of Arkansas are still pending and undetermined.

POINTS.

I. If this court takes jurisdiction here, it can only be upon the single ground that the Supreme Court of Arkansas decided against the validity of the pre-emption right claimed by the heirs of Ludovicus Belding; and must, to determine that, pass upon the other claims.

II. Precisely the same claims are submitted by the parties to the Court of Claims, by all these parties, under the act of Congress; and all of them have, before the writ of error sued out here, and before the judgment and decree below, elected to have their rights determined in that forum. Rector is entitled to ask that he may not be vexed and harassed by two separate considerations of his claim.

III. This court will not pass upon the titles of these parties, in advance of the decision of the tribunal offered them by Congress and accepted, and before their claims will be fully, fairly and directly considered and adjudicated, the United States defending, who are no parties here; for, whatever the decision there the parties will have the right to come here on appeal, to have a *second* adjudication.

IV. The defendant in error may plead, either in abatement or in bar, of the writ of error. In *Winn* v. *Lloid*, 1 *Levinz*, 72, an entry by the plaintiff in error was pleaded, in part pending the writ, by the Terretenant. But it was held "that the tertenant cannot plead in abatement of the writ of error, but only in bar, as a release, &c., in maintenance of his title; *for the scire facias against him is not to hear the errors*, but only to hear the process and record; and thereto Twysden and Wyndham inclined."

The defendant in error may, instead of joining in error, plead a special plea or demur. *Tillinghast & Yates, Treatise*, 85. 1 *Arch. Pr.*, 257. *Graham's Pr.*, 958. 2 *Tidd, Pr.* 1232.

V. Another action depending is pleadable in abatement. *Bowler* v. *Spathurst*, 1 *Lutw.*, 33. *Sparry's Case*, 5 *Co.*, 61, *Per Bayley J. Harley* v. *Greenwood*, 5 *Bam. & Ald.*, 101. "The commencing of an action in one court does not destroy the right of the party to commence an action for the same debt in another court. The defendant may indeed plead in abatement the pendency of the former action; but he cannot plead it in bar." *Rawlinson* v. *Oriett & Benson*, *Carthew*, 96. *S. C. Holt*, 1, *where, per* HOLT Ch. J., "The reason why another action pending shall abate the subsequent action is, because of the double vexation." *Brook* v. *Smith*, *Holt*, 285. *Bezabel Knight's Case*, 2 *Ld. Raym.*, 1014. *Knight's Case*, 1 *Salk.*, 329. *S. C. Holt*, 255: 3 *Salk.*, 238.

Also, *Hart* v. *Granger*, 1 *Conn.*, 154. *Gelstin* v. *Hoyt*, 3 *Wheat.*, 314. *Newell* v. *Newton*, 10 *Pick.*, 470. *Johnston* v. *Bower*, 1 *Hen. & Munf.*, 215. *Commonw.* v. *Churchill*, 5 *Mass.*, 174. *Embree* v. *Hanna*, 5 *Johns.*, 101. *Engle* v. *Nelson*, 1 *Pennsyl.*, 442. *Davis* v. *Granger*, 3 *Johns.*, 259. *Percival* v. *Hickey*, 18 *Johns.*, 257. *Logs of Mahogeny*, 2 *Sumner*, 589.

JOHN B. SANBORN,
ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel for Rector.

Supreme Court of the United States.

WILLIAM H. GAINES *et al.*, PLAINTIFFS IN ERROR,
vs.
JOHN C. HALE AND HENRY M. RECTOR. } *No.* 117.

BRIEF FOR JOHN C. HALE, *Defendant in Error.*

This is a writ of error to the supreme court of Arkansas. Two bills were filed on the chancery side of the circuit court of Hot Springs county; one by Hale *vs.* Rector and the heirs of Belding, and the other by Rector *vs.* Hale and the heirs of Belding. These two cases were consolidated in the circuit court, as the three parties, Hale, Rector, and Belding's heirs, all claimed title in different rights to the well-known tract of land on which the Hot Springs are situated, viz: the S. W. qr. of sec. 33, T. 2 S., R. 19, W. of the 5th principal meridian.

Hale claims under John Percifull, who settled on the land as early as 1812, improved it, and continued his occupancy for many years, claiming under the pre-emption laws from 1814 down to the time of his death.

Belding was a tenant of Percifull, as such residing on the land in 1829 and 1830. He set up a claim in his own right under the pre-emption act of 1830. His heirs were subsequently allowed to make an entry of the land for the singular purpose, as was stated, of enabling the several parties claiming to contest their respective rights before the

courts. This entry, however, has since been annulled by order of the Secretary of the Interior.

Rector claims under a New Madrid location said to have been surveyed in 1820.

Neither of these parties is invested with the legal title to the land. This remains in the United States. But Gaines *et al.*, the heirs of Belding, relying on their certificate of entry, brought actions of ejectment against Hale and Rector, who have long been in possession of the property. By the laws of Arkansas, a certificate of entry is made a sufficient title to maintain an action of ejectment; and, of course, the heirs of Belding prevailed at law against both the defendants in error. The two bills in equity were filed to enjoin the execution of the judgment, and for the purpose of settling the titles of the several parties.

The decree of the circuit court is to be found on pages 228 to 231 of the printed transcript. It assumes to establish the pre-emption right of John C. Hale as superior to that of Belding's heirs, and also to the New Madrid claim of Rector. It decrees, also, that the certificate of entry to Belding's heirs be cancelled, or that the same be held in trust for Hale; and, finally, it perpetuates the injunction against the judgment at law.

From this decree both Rector and Belding's heirs appealed; and the supreme court of Arkansas reversed the decree of the circuit court, and added the following: "That each and all of the parties to this suit are decreed to have title to the respective improvements made by them as against all parties but the United States, and that all parties be inhibited from enforcing the judgment at law, and that each party pay his own costs."

The substance and effect of the decision of the supreme court of the State are nothing more than this: That the legal title to the land in dispute is in the United States, and that the courts will not undertake to adjudicate those questions which may be pending in the General Land Office, and are properly to be decided there. The circuit court had assumed to settle all the questions of title between the parties; the appellate court simply set aside this decree, and refused to consider the question of title at all.

In the case of Gaines *vs.* Thompson, (7 Wall., 347,) this court refused to interfere by injunction to prevent the cancelling of the Belding entry, (the same involved in this case,) on the ground that it was a question committed to the executive officers, to be in the first instance determined by them. It is only after the Government has parted with the legal title to lands that the courts can interfere to settle the equities of conflicting claimants. A long series of decisions in this court, from Lytle *vs.* The State of Arkansas, in 9 Howard, and again in 22 Howard, down to the present time, have proceeded on this principle.

Hale *vs.* Gaines *et al.*, (22 How., 144,) was this case brought up from the judgment at law in ejectment. Mr. Justice Catron, delivering the opinion of the court, said: "As between the titles of the United States and Belding's heirs, the State courts did not decide, but only that the outstanding title in the United States could not be relied on by the defendant in this action; nor is the validity of the entry of Belding's heirs drawn in question in this court." And again: "Suppose that Percifull's right to appropriate the land in dispute was undoubted, and that the register and receiver had allowed the heirs of Belding to enter wrongfully, still the courts of Arkansas in this action of eject-

ment had no right to interfere and set up Percifull's rejected claim."

Evidently the merits of the several claims of title were not involved in that case. The court explicitly refused to consider them, notwithstanding some *dicta* apparently to the contrary in the opinion of Justice Catron.

But since that case was before this court, the Belding entry has been annulled. It was never a valid entry, and never intended to be an absolute sale of the land. Therefore the foundation of the action in ejectment was wholly taken away.

Transcript, 207, 208.

If it were possible for this court now, on this record, to decide which of the parties is entitled to the grant of the land in dispute, it would be easy to show the superiority of Hale's claim over all the others. The judgment of the circuit court of Hot Springs county was sound and just, admitting that the court had authority to take the place of the General Land Office, and do in the premises what ought to have been done there. This authority, however, cannot be claimed for the courts, either State or Federal. But Congress, by the act of June 11, 1870, has conferred this jurisdiction on the Court of Claims. (16 Stat., 149.)

The elaborate brief for the plaintiffs in error insists that the cancellation of the certificate of entry was nugatory; and, in fact, the whole fabric of its learning is built on this position. But how can this court decide that point when the Government is not a party to this suit? The legal title is in the Government, beyond a doubt, whether the entry was good or bad. (Wilcox *vs.* Jackson, 13 Pet.) This court would not prevent the cancellation when the Government was represented by the Secretary of the Interior, in the case in 7 Wallace. Will it now adjudge the validity

of the act of cancellation when the Government is not represented at all? Under the act of Congress above quoted, petitions have been filed by all the parties in the Court of Claims, and the Government has there consented to become a party to the proceedings. It is plain that here, in this case, the counsel for the plaintiffs in error have expended their learning in vain.

The entry being annulled, the ejectment became a wrong and was properly enjoined. But has the court any jurisdiction of that question? It was only by virtue of a State law that the certificate of entry was declared a sufficient title to support an action of ejectment. The effect of the judgment based on the certificate depended wholly on the law of the State; and when the injunction was perpetuated it was only the right claimed under the State law which was called in question.

As to the improvements made on the land by the respective parties, no other decision could have been made but that embodied in the decree of the supreme court of the State. That decision was right, whether the subject be, or be not, within the jurisdiction of this court.

It is argued that "the plaintiffs below must recover, if at all, on the strength of their own titles." But the maxim is misapplied. The plaintiffs below did not seek to recover anything; they only sought to defeat the recovery by Belding's heirs, who had no title to sustain their ejectment.

FRED. P. STANTON,
For Jno. C. Hale.

UNITED STATES SUPREME COURT,

DECEMBER TERM, 1872.

WILLIAM H. GAINES, AND OTHERS,

No. 117. *vs.*

JOHN C. HALE AND HENRY M. RECTOR.

BRIEF FOR HENRY M. RECTOR,
Defendant in Error.

ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel.

GAINES & OTHERS *vs.* HALE & RECTOR.

BRIEF OF HENRY M. RECTOR.

HALE filed a bill in the Circuit Court of Hot Springs county, Arkansas, setting up a claim by pre-emption, as assignee of John Percifull, under act of 12th April, 1814, to a quarter section of land including the Hot Springs of the Ouachita, in Arkansas, against the heirs of Ludovicus Belding, claiming a pre-emption under the act of 1830, and Henry M. Rector, claiming title to 170 acres including the same springs, under the New Madrid law, by location in 1820.

He prayed decree that his pre-emption was valid, proven, &c., and entitled him to certificate and patent, and that the other claims were void; and that the title to the land might be decreed to him. And he prayed and obtained an injunction against the execution of judgments for possession of the lands, and assertion of title, at law, by Belding's heirs and Rector. *Record*, 27, 28, 29.

Gaines and the other heirs of Belding answered (*Record*, 144), impeaching Percifull's pre-emption, and setting up Belding's; and praying (with demurrer) dissolution of the injunction, and restoration of their writs of possession, or appointment of a receiver. (157.)

Rector filed a bill, setting up his title under the New Madrid claim, and impeaching the Belding pre-emption, and praying injunction as prayed by Hale, and decree annulling all the pre-emption claims, and declaring his title perfect under the New Madrid claims. (273.)

Gaines and the other heirs of Belding answered this (322), discussing and impeaching Rector's title, and setting up their own, with the same prayer as in their other answer. (342.)

The Circuit Court (the cases being consolidated), decreed (228, 230), that Gaines and the other heirs be perpetually

enjoined from enforcing their judgments at law, and required to deliver possession; that their certificate of entry be given up, and cancelled, and they declared trustees of the title for the representatives of Percifull, and all their right and title be vested in Hale and Rector, and be divided between them according to their agreement with each other as pleaded; and that the title of Rector to the residue, outside of the quarter section claimed by pre-emption, covered by the New Madrid location be confirmed, and his possession of it quieted; Hale and Rector paying to the heirs of Belding $200 and interest, purchase money paid by them to the United States on the 19th of December, 1851; with provisions for accounts of rents and profits, &c.

Gaines and the other heirs, and Rector, appealed to the Supreme Court of the State, the latter because the quarter section was decreed to Hale, and only a portion of the land covered by the New Madrid claim to Rector. (668.)

The Supreme Court decided that the Circuit Court erred in declaring that Hale's claim was good, and that his title should be quieted, and granting him perpetual injunction. So far the decree of the Supreme Court was in favor of Gaines; as it was in decreeing that the judgment [decree] should be and was, "for the errors aforesaid, reversed, annulled, and set aside;" but it was further decreed, that each and all of the parties to this suit be, and are decreed to have title to the respective improvements made by them as against all parties but the United States; and that all parties be and they are hereby inhibited from enforcing the judgment at law, and that each party pay his own costs."

The appeal of Gaines and others must be here upon the ground that the decision of the Supreme Court of Arkansas was adverse to the right to the land by pre-emption, claimed by them under the laws of the United States.

The heirs and legal representatives of Belding claimed under the pre-emption act of May 29, 1830. Under that (1 *Lester*, 41) he must have been in possession on that day, and have cultivated in 1829, some part of the land, to entitle him to pre-emption; and proof of these facts was required to be made to the satisfaction of the Register and Receiver.

On the 20th of April, 1832, the Hot Springs and five sections of land including them were reserved from sale, entry, and location. 4 *Stat.*, 505.

At the same session, on the 14th of July, persons occupy-

ing lands, the surveys whereof had not been made and returned, were to be permitted to enter the lands, on the same conditions, in every respect, as were prescribed in the act of 1830, within a year after the surveys should have been made. 4 *Stat.*, 603.

And the act of 1830 was revived and continued in force for two years and no longer by the act of 19th June, 1834. (4 *Stat.*, 678.) It was again revived and continued in force for two years by the act of 22d June, 1 38. (5 *Stat.*, 251.) But it was expressly provided by that act that it should not be so construed as to give a right of pre-emption to any one, to any land specially occupied or *reserved* for town lots, *or other purposes*, by authority of the United States.

The proof adduced, on the final investigation, before the Register and Receiver, in regard to the Belding claim, is contained on pages 359 to 390 of the *Record*.

The Receiver decided that Belding was in possession on the 29th of May, 1830, not in his own right, but as tenant under a lease from John Percifull; and that he did cultivate a part of the land, or cause it to be cultivated, but acquired the right to do it under the lease, and made the improvements under an agreement with Percifull to do so, as the consideration for the lease. Wherefore he decided that he was not in possession on the 29th of May, 1830, and did not cultivate in 1829, within the meaning and spirit of the law. (390.)

The Register decided that he did cultivate in 1829, and had possession on the 29th of May, 1830. (391.)

The *proof*, as to this possession, was that he had *not* personal possession at that date; but that in February, or at any rate prior to the 29th of May, he in his turn leased to a third person, and moved away from the land altogether. Mrs. Belding herself testified (362) that he rented to Thompson before his family removed to another place; to wit, in February, 1830. After that he had merely a store there. See testimony of Calloway, (365, 366;) Belding removed in April, to a farm on the Gulpha, and never lived at the springs afterwards. (367.) This was six miles from the springs. (369, 370.) See testimony of Kelly, (375); Sorter, (379); Grant, (38).

On the 19th of December, 1851, the heirs of Belding were permitted to pay $200 to the Receiver, at Washington, Arkansas, as the price of the quarter section, it being noted,

"according to instructions," in the certificate of payment, that the entry interfered with the New Madrid claim, and embraced lands directed to be reserved by the act of 20th April, 1832, and was only permitted to be made under the decision of the Secretary of the Interior, and instructions from the Commissioner of the General Land Office, of specified dates. *Record*, 391.

The Secretary permitted the entry in order that the claimants might "be placed in a position to contest the adverse claims of others to the same land."

On applying for the permission to make the entry, (which the Commissioner refused, and the Secretary granted on appeal,) the heirs stated that, "of course, under the decision of the Secretary, they should not ask for a patent." *Record*, 521, (where it is so stated in the Commissioner's instructions as to allowing the entry.)

The agreement of Belding, under which he obtained possession of the springs, is evidenced by his written declaration, to be found at page 30 of the *Record*, made on the 2d of April, 1831, and acknowledging that he leased from Percifull, and the latter's right to the improvements; and ending with the declaration, "that I have no pretensions to the improvements of said springs, except under the claim of the said John Percifull."

This agreement and obligation, binding himself to keep the original verbal agreement of leasing, which is admitted by the answer of Gaines and others, though they required proof of the written agreement, (*Record*, 149, 154,) and disclaiming any pretensions to the improvements at the springs, except under Percifull, is proven by Hiram A. Whittington, on whose evidence of hand-writing it had been recorded. *Record*, 242; Hawkins, 239; Runyon, 240.

Belding himself never set up any claim to a pre-emption. The claim was first presented to the land officers, as the answer of the heirs states, (*Rec.*, 147,) in March, 1839. (The date 1838, on page 150, is a misprint.) It was preferred by Lydia Belding, his widow. No decision was made or action had, in consequence of the act of 1832, which expressly provided that the land reserved, including the Hot Springs, should not "be *entered*, located, or appropriated for any other purpose whatever."

The proof made by Mrs. Belding is at page 182.

In October, 1850, the Commissioner of the General Land

Office, under instructions from the Secretary of the Interior, directed the land officers to examine and adjudicate the pre-emption claims. (*Rec.*, 186.) The proof taken on the Belding claim is at pp. 359 *et seq.* of the *Record*.

The heirs of Belding, in violation of their agreement, by means of which they obtained the certificate, afterwards applied for a patent. On the 27th of April, 1860, the Commissioner of the General Land Office referred the matter to the Secretary of the Interior, who, on the 7th of June, 1860, decided that the allowance of the entry was in violation of law, and that the certificate had no validity, wherefore the entry should be cancelled, and the invalidity of all subsisting claims declared. *Letter of Commissioner, Record*, 202 *to* 206; *Decision of Secretary*, 206 *to* 208; *Admission of the Heirs, by answer*, 208. This decision was before this court, in *Gaines* v. *Thompson*, 7 *Wallace*, 347, where the court refused to interfere with it by mandamus or injunction.

BRIEF OF ARGUMENT.

POINT 1st.—The heirs of Belding claim to bring here a decision of the Supreme Court of Arkansas, denying, or adverse to a right or privilege claimed them under act of Congress. This right or privilege of pre-emption was stated and impugned by the bills of Hale and Rector, and the impeachment denied by the answers of the heirs; but they have not as complainants sought to have it confirmed and adjudged to give valid title, as against the other claims, nor even by their answers asked a decree confirming it.

It is true that the Supreme Court decreed that each party should have title to the respective *improvements* made by them, as against all parties but the United States; and it may be argued that this was a decision that the title was still in the United States, and that the heirs of Belding had not become invested with it by their peculiar certificate of purchase. But this is not a decision against their right of pre-emption; for it does not deny their right, against the other parties and the United States, to have their title perfected by a patent.

And it may be argued that it is to refuse to the heirs possession of parts of the quarter section, by virtue of their

certificate, and execution of their possessory judgments obtained by virtue of it.

But this is, under the circumstances, only a decision, not that the pre-emption right is invalid, but that the certificate did not pass the legal title of the United States, or give the heirs the exclusive right of possession. They asked it, and it was given them, to put them on an equal footing with the other claimants, (521,) and not to give them a legal advantage and superiority over the others, by a right to oust the latter from possession. They disclaimed intention to ask a patent upon it, (521); and if they used it at law to oust the others and gain exclusive possession, this was a fraudulent use of it, warranting the decree rendered, whether their right of pre-emption was valid or not. This court, in *Gaines* v. *Thompson*, refused to interfere with the order of the Secretary of the Interior, annulling the entry; and his action was right and proper: as the decision of the Supreme Court of Arkansas was, refusing to permit it to be used in fraud of the purpose for which it was issued.

POINT 2d.—Also, the decision of the Supreme Court of Arkansas may well have proceeded upon the ground that the contract between Belding and Percifull, under which the former obtained possession, evidenced and solemnly affirmed by his declaration of 2d April, 1831, (*Record*, 30, 188, 242,) estopped the heirs of Belding to oust the assignee of Percifull of the land, by virtue of a pre-emption and certificate obtained or sought to be used, in violation of it. The agreement was made on good consideration, and was valid and binding in equity, not only as an estoppel, but as creating a trust and entitling Percifull and his heirs or assigns to demand in equity a conveyance to him or them of the pre-emption title, if obtained. Though it could not prevent the allowance of the pre-emption, or be noticed by the land officers, it was effectual in equity. Morally, the claim to a pre-emption, and the use made of the certificate, were a criminal fraud, on the part of the heirs of Belding; and Gaines and the other heirs sought to make the courts their accomplices in making it effective and profitable.

POINT 3d.—If the decision below can be deemed to be against a right, privilege, or exemption claimed under act

of Congress, it was nevertheless right, because the certificate vested no legal title. For the land officers could not sell lands reserved from sale in 1832, nor the heirs of Belding purchase them, wherefore it *could* not vest title: and there *was* no sale, but a deposit of the price, and a special certificate that showed on its face, by reference to a conflicting claim, and to the reservation by law, that it was not an absolute and unconditional sale. It was an improvident act on the part of the Secretary to permit it, because of want of power to direct allowance of a purchase, and equal want of power to direct a qualified certificate without a sale and purchase.

POINT 4th.—The pre-emption was fraudulent, because Belding had no such possession on the 29th of May, 1830, as the law contemplated. He had leased from Percifull for five years, and in February, 1830, he leased to Thompson, retaining only two cabins, in one of which he had a small stock of goods for sale; his family moved away, and he was there only occasionally. The cabins he still held under his lease from Percifull. The pre-emption law was not enacted to give rights to persons having only that sort of possession. His home was not there, but six miles distant.

POINT 5th.—And, if he had then been in possession, he lost his right to pre-emption by afterwards removing to another place and remaining there. The act of 14th July, 1832, certainly intended that the party to be benefited by it should be still in possession. If he had abandoned the land any other person could occupy it, and would be entitled to the benefit of a subsequent pre-emption law. The law never meant to grant pre-emption to any one who should abandon the land before proving his claim and applying to enter it. In this case Belding removed permanently from the land before the right of pre-emption was even created by law. Having a store there was not residence on it. And, at all events, he had removed long before the act of 1830 was revived by the act of 1834, and therefore could not have the benefit of that revival, or of the act of 1838.

POINT 6th.—Whatever the merits of the pretended pre-emption, the act of 1832, reserving the land from sale and prohibit-

ing its entry or disposal, withdrew it from the operation of the pre-emption laws, the right of preference in purchase then remaining unexercised. The "entry" after that was merely void, and the use made of the certificate a fraud, besides imputing to the officials who permitted it gross and palpable abuse of power and insolent contempt of the prohibitions of the law. It has been from the beginning a very scandalous transaction, fraudulent pretences being used to obtain the certificate and a fraudulent use made of it afterwards. No vested right under his pre-emption could have been obtained until the purchase money had been paid and the receipt of the proper officer obtained. Until then it was within the legal and constitutional competency of Congress to withdraw the land from entry or sale, though this might defeat the imperfect right of the settler. *Frisbie* v. *Whitney*, 8 *Wall.*, 187. This court had made the same decision, as to Percifull's pre-emption, in *Hale* v. *Gaines*, 22 *Howard*, 144. He had, the court said, when the act of 1832 passed, "no vested interest in the land that a court of justice could recognize." The validity of the entry of Belding's heirs, the court said, was not drawn in question in this court, in that case.

POINT 7th.—The title to this land being in the United States, who were not and could not be a party, the whole litigation, so far as *title* was drawn in question, was idle, useless, and frivolous. The Supreme Court of Arkansas properly reversed the decree below, because it confirmed Hale's title, with various consequences. And finding an agreement between Hale and Rector, (*Exhibit C*, 14, *Rec.*, 126,) and that of Belding with or in favor of Percifull, it properly left the parties as they were, each to have his own improvements; one having, while the title remained in the United States, no better right than the other.

POINT 8th.—The decree of the Supreme Court of Arkansas simply protects Hale and Rector in their possession, not disturbing that of Belding's heirs. It protects them against a title at least no better than theirs. If this is not done and decreed upon the ground that the Belding pre-emption is invalid, so as to be a denial of the privilege of preference in purchase, claimed under the pre-emption acts, then this court cannot inquire whether the decree is right. It is not *put* on that ground. The title being in the United States,

that court did in fact not pass on the validity of the pre-emption. 26 *Arkansas*, 168.

POINT 9th.—If the Supreme Court of Arkansas has so decided against the validity of the pretended pre-emption of Belding, as that it devolves upon this court, although the United States have not granted the land to any one, to inquire and determine whether the heirs of Belding are entitled to a patent, or whether their pretended purchase, and their certificate, gave them any manner of title, it would then be necessary to discuss and consider the merits of the location of the New Madrid claim of François Langlois in 1820; since, if that location was valid, and actually made, no title remained in the United States, to be granted to any one, and no pre-emption right could possibly be obtained to so much of the quarter section as is included in that location.

By act of Congress of June 11, 1870, (16 *Stat.*, 149,) jurisdiction in equity has been given to the Court of Claims to hear and determine all claims to the Hot Springs, and all claims on which suit has not been brought in that court within ninety days from the passage of that act, are forever barred: by which act the right of appeal to this court is given to each party.

If this court is at liberty, notwithstanding that act, to adjudicate upon the titles of Percifull, Rector, Hale, and Belding's heirs, it will only do so in case the record is such that it cannot escape from that labor. It is submitted that the location of the claim of Langlois was valid, and that under it Rector has the right to the land, by title prior and paramount to that of Belding's heirs; and this we are prepared to maintain, if the court shall consider that the inquiry is imposed upon it; and offer to file the argument prepared in support of that claim in the Court of Claims as an argument here, if it can be considered.

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